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THE COURT OF LIFE AND DEATH: THE TWO TRACKS OF CONSTITUTIONAL SENTENCING LAW AND THE CASE FOR UNIFORMITY

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THE COURT OF LIFE AND DEATH:
THE TWO TRACKS OF CONSTITUTIONAL SENTENCING LAW
AND THE CASE FOR UNIFORMITY

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The Supreme Court takes two very different approaches to sentencing law. Whereas its review of capital sentences is robust, its oversight of noncapital sentences is virtually nonexistent. Under the Court's reading of the Constitution, states must draft death penalty statutes with enough guidance to avoid death sentences being imposed in an arbitrary and capricious manner. Mandatory death sentences are disallowed, and the sentencing authority must have the opportunity to consider mitigating evidence. The Court will scrutinize whether the death sentence is proportionate to the crime and the defendant, and it has frequently exempted certain crimes and certain offenders from a capital sentence to avoid an unconstitutionally excessive punishment. The Court does not insist of any these requirements in noncapital cases.

This Article argues for the abandonment of this two-track approach to sentencing. It finds no support in the Constitution's text, history, or structure, and the functional arguments given by the Court to support its capital decisions apply with equal force to all other criminal punishments. But it is not just the Court's poor legal reasoning that makes its sentencing jurisprudence misguided. It has also been a policy failure for capital and noncapital defendants alike. As long as the two tracks exist, significant sentencing reform is all but impossible. If death were no longer different as a matter of constitutional law, our criminal justice system would be – and almost certainly for the better.

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INTRODUCTION

Death is different, according to the Supreme Court.¹ And the Court is hardly guilty of understatement. Its capital sentencing jurisprudence departs from its noncapital sentencing case law in the most fundamental ways. In capital cases, the Court insists that statutes guide the sentencing authority's discretion so that a death sentence cannot be imposed in an arbitrary and capricious manner. Mandatory death sentences are disallowed, and the sentencing authority must have the opportunity to consider mitigating evidence. The Court will scrutinize whether the death sentence is proportionate to the crime and the defendant, exempting certain crimes and certain offenders from a capital sentence to avoid an unconstitutionally excessive punishment. In noncapital cases, in contrast, the Court has done virtually nothing to ensure that the sentence is appropriate. Mandatory punishments proliferate with no attention to an individual's particular culpability, sentences are frequently disproportionate given the actual conduct and culpability of the offender, and arbitrariness abounds.

Although the Court has relied on the "death is different" mantra time and again in its case law to justify its stark two-track system for sentencing, the traditional tools of constitutional interpretation – text, history, and structure – do not support the Court's elaborate set of rules for death and its virtually non-existent role in overseeing any other criminal sentence. The functional explanations used by the Court to support its capital rulings also fail to support the Court's bifurcated approach, for these arguments apply equally to noncapital cases. If they are persuasive in one context, they should be persuasive in the other.

It is not just the Court's slight legal reasoning that calls into question the two tracks of sentencing; the Court's two-track approach has also been a policy failure for capital and noncapital cases alike. The Court's additional protections for capital cases satisfy neither the critics nor the supporters of the death penalty. Critics of the death penalty are unhappy with the Court's approach because it helps preserve capital punishment. People who are not unalterably opposed to the death penalty but who are concerned that it be administered fairly gain false comfort from the fact that the Court has created heightened protections for capital cases.² But, as scholars of the Court's death

¹ The origin of using the difference of death to justify a separate jurisprudence for capital punishment lies with Justice Brennan and his concurrence in *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States"). See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument).

² Steiker & Steiker, *supra* note 1, at 436 ("[T]he elaborateness of the Court's death penalty jurisprudence fuels the public's impression that any death sentences that are imposed and finally upheld are the product of a rigorous – indeed, too rigorous – system of constraints" and this "impression of enormous regulatory effort while achieving negligible regulatory effects, effectively obscures the true nature of our capital sentencing system."); Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 26 available at <http://ssrn.com/abstract=1154766> ("by virtue of the Court's continuous involvement in the

penalty jurisprudence have pointed out, the protections established by the Court fall far short of addressing the concerns raised by capital punishment.³ There are extra rules, but they do not go to the core problems with the death penalty's administration. Meanwhile, supporters of the death penalty decry these same safeguards because they create the perverse situation that the worst criminal offenders receive more process than any other defendant and because the Court saddles death cases with greater burdens on the prosecution.⁴ Pro-death penalty advocates are therefore able to use the Court's jurisprudence as a rallying cry for tough-on-crime and pro-death penalty legislation.⁵ And as bad as the Court's two-track jurisprudence may be for death cases, it is far worse for noncapital matters. Noncapital sentencing languishes in a backwater devoid of any procedural protections.

Perhaps the most disconcerting part of the Court's bipolar approach to sentencing is that its very nature makes it resistant to change. By not having to consider criminal sentencing questions under the same constitutional rules, the Court can scrutinize death cases more closely without taking on the burden of policing all criminal cases. The Court has an interest in doing this because it allows the Court to feel better about its role in capital punishment's administration without paying much of a price. The Court likely feels some responsibility for the resulting death in an execution because of its significant

regulation of capital punishment, the Justices' work in this arena can create the highly inaccurate impression that courts are systematically working on system-wide remedies to the various problems that continue to burden the administration of capital punishment in the United States").

³ See Steiker & Steiker, *supra* note 1, at 398-399 (noting that the problems of inadequate defense counsel and racial disparity in application remain even under the Court's death-is-different cases).

⁴ See, e.g., *Coleman v. Balkcom*, 451 U.S. 949, 958-59 (1981) (Rehnquist, J., dissenting) (noting that, "[w]hat troubles me is that this Court . . . has made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes" and that "this Court surrounds capital defendants with numerous procedural protections unheard of for other crimes").

⁵ After the Supreme Court's decision in *Furman*, for example, there was widespread criticism of the Court followed by political outpouring of support for new death penalty legislation. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 46-56 (2007) (describing the backlash to *Furman* and how it "stimulat[ed] political countermobilization and a resurgence of death penalty support"); Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 381 (2008) ("By constitutionalizing capital punishment, the Court inadvertently politicized it, and the political process quickly responded with new death penalty schemes crafted to correct the defects identified in *Furman*."). In more recent times, political support for the Anti-Terrorism and Effective Death Penalty Act (AEDPA) rested in part on those who blamed delays between sentencing and actual executions on "liberal judges . . . [who] continue to allow this to happen because they do not like the death penalty." 141 Cong. Rec. 15,062 (1995) (statement of Sen. Hatch). President Clinton joined this chorus, noting that "endless death row appeals have stood in the way of justice being served." Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 Pub. Papers 630, 631 (April 24, 1996), available at 1996 WL 203049 (White House, April 24, 1996). For a general discussion of the politics surrounding AEDPA, see Bryan A. Stevenson, *The Politics of Fear and Death, Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 723-730 (2002).

role in overseeing all capital cases' compliance with the Constitution.⁶ The Court typically receives a petition for a stay on the eve of an execution, so it knows that it is usually the last stand between the defendant and the end of his or her life. That is a heavy load to bear, but by allowing itself to give special scrutiny to capital cases, the Court can alleviate some of its worries about how a capital sentence has been administered. At the same time, by cabining capital cases to a separate category, the Court never has to confront the question of whether it is prepared to give greater oversight to all criminal cases in exchange for the benefits it wants to achieve in capital cases. In 2004, more than one million adults received noncapital sentences versus 115 people who received death sentences.⁷ The Court has focused on the one percent of cases it views as the most sympathetic and created a special jurisprudence for them. With those cases off the table as a cause for concern, the Court can – and has – ignored the rest.

The entrenchment goes deeper still. By creating a two-track system, the Court has taken what should be natural allies for broader criminal justice improvements – capital and noncapital defendants and their representatives – and placed them at odds with one other. Capital punishment reformers now explicitly argue that the protections they are requesting should only apply to capital cases so that they can emphasize the low burden their requests would impose on the system.⁸ These reformers therefore explicitly cast aside noncapital cases as areas in need of reform. In addition, death penalty abolitionists frequently tout life without parole as a viable sentencing option, even though noncapital sentencing reformer have highlighted that life without parole itself raises fundamental questions of justice.

The Court's two-track approach to sentencing is troubling not only because it maintains the status quo at the Court, but also because reform through the political process is so difficult for noncapital cases.⁹ It is almost impossible for the millions of people serving noncapital sentences to get the public's attention about injustices in noncapital sentencing law, even though there are many.¹⁰ While the politics surrounding capital punishment is hardly a

⁶ James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 106-107 (2007).

⁷ U.S. Dept. of Justice, Office of Justice Programs, *Felony Sentences in States Courts*, 2004 (July 2007)

⁸ *See supra* TAN ___-__.

⁹ For a description of the politics of sentencing, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1028-1031 (2006); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1280-1283 (2005); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723-735 (2005).

¹⁰ For examples that made their way to the Court, see TAN ___-__. These are, of course, just the tip of the iceberg. *See, e.g.*, Families Against Mandatory Minimums, *The Issue*, <http://www.famm.org/ExploreSentencing/TheIssue.aspx> (last visited Aug. 27, 2008); FAMILIES AGAINST MANDATORY MINIMUMS, PRIMER: THE CASE AGAINST MANDATORY SENTENCES (2005), <http://www.famm.org/Repository/Files/PrimerFinal.pdf>; RYAN S. KING, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA'S CITIES (2008), http://www.sentencingproject.org/Admin/Documents/publications/dp_drugarrestreport.pdf;

model of rationality, capital punishment has generally been subject to more political scrutiny and consideration than noncapital punishment. The Court's approach therefore exacerbates the imbalance that already exists in the political process.

This is not to suggest that Court oversight is not needed in capital cases, because it plainly is. The political process surrounding the death penalty is itself still deficient, and the Constitution demands judicial review of criminal sentencing.¹¹ The point here is that this same judicial oversight is needed in noncapital cases – perhaps more so.

This Article argues that it is time for the Court to abandon the two track approach to criminal sentencing. It is wrong as a matter of doctrine, and it is unwise as a matter of policy. It has harmed capital and noncapital defendants alike, and most sentencing laws are virtually impervious to improvement so long as the Court clings to the claim that it need not apply the same constitutional rights to capital and noncapital defendants.

After outlining the Court's two sentencing tracks in Part I, Part II argues that the Constitution does not justify the Court's bifurcated approach. Part III then explains why the two-track system is bad for criminal justice policy. Part IV argues that there are good reasons to believe that a switch to uniformity would improve both capital and noncapital sentencing. If death were not different as a matter of constitutional law, our criminal justice system would be – and almost certainly for the better.

I. HOW DEATH MAKES A DIFFERENCE

Most constitutional rights belong to capital and noncapital defendants alike. The core protections for criminal cases in the Fourth, Fifth, and Sixth Amendments, for example, apply equally to both sets of defendants. Conversely, when the Court rejects arguments for a proposed right, it similarly treats capital and noncapital cases alike.¹²

Shimica Gaskins, Note, "Women of Circumstance"—The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes, 41 AM. CRIM. L. REV. 1533 (2004).

¹¹ U.S. CONST. amend VIII.

¹² The most important example of this is the Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987). The defendants there relied on powerful statistical evidence that the death penalty was imposed disproportionately in cases with white victims. They argued before the Court that this evidence of disparate impact was sufficient to prove discrimination and that they did not need to prove intentional discrimination in capital cases because death is different. The Court refused to employ the two-track approach in this context because of its concern that the defendants' argument would, taken "to its logical conclusion, throw into serious question the principles that underlie our entire criminal justice system." *Id.* at 314-315. The Court worried it "could soon be faced with similar claims as to other types of penalty." *Id.* at 315. The Court has similarly refused to create special rules for death in other contexts. *See, e.g., Steiker & Steiker, supra* note __, at 398-401 (explaining that postconviction procedural doctrine have been treated similarly in both capital and noncapital cases).

But that is not always the Court's approach. The Court has recognized a series of constitutional rights that apply only to capital defendants.¹³ The Court's cases granting capital defendants greater procedural and substantive protections comprise the "death is different" canon. While these cases cover a range of areas,¹⁴ this Part focuses on the Court's decisions that create a robust role for judges in determining whether a capital sentence is appropriate. The cases discussed are the substantive core of the Court's death-is-different case law, and they stand in sharpest contrast with the Court's noncapital decisions.¹⁵

¹³ "In the context of capital punishment, the Supreme Court has tried to ensure a closer correlation between legal guilt and actual guilt." Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1603 (2001).

¹⁴ Additional cases make up the death-is-different canon beyond the ones discussed here. For example, the Court has carved out special rules concerning what capital juries must be told about sentencing options. *See, e.g.*, *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (holding that, as a matter of due process, defendants in capital cases are entitled to instructions on lesser included offenses); *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) (refusing to apply the standard for reviewing ambiguous jury instructions that the Court developed in the capital case of *Boyde v. California*, 494 U.S. 370 (1992)). To take an example involving innocence claims, the Court has recognized that an individual who can show that he is actually innocent of the aggravating circumstances that make him eligible for the death penalty can raise that claim on habeas even if the claim could not be raised under normal rules of procedural default, but it has not yet recognized the same exception for noncapital defendants. *See Dretke v. Haley*, 541 U.S. 386 (2004).

The Court may have also recently established a different standard for effective assistance of counsel at sentencing. Although it has stated that the same test from *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984), applies to capital and noncapital cases alike, it has recently applied that test more stringently in capital cases to make clear that capital defense lawyers must conduct thorough investigations into mitigating evidence. *See Rompilla v. Beard*, 545 U.S. 374, 377 (2005) (defense lawyers must make reasonable efforts to investigate and review any material that the prosecution has indicated will be relied upon at sentencing phase); *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding counsel ineffective for failing to conduct an investigation that would have uncovered the defendant's troubled childhood because counsel erroneously believed state law barred access to those records); *Wiggins v. Smith*, 539 U.S. 510 (2003) (holding that counsel was ineffective for failing to investigate beyond a pre-sentence report and a department of social services records because those records counsel suggested that further investigation into defendant's social history would provide further mitigating evidence). Some commentators have concluded from these cases that the Court is, in deed if not in word, applying a more rigorous standard for counsel in capital cases. *See, e.g.*, Erwin Chemerinsky, Keynote Address, *Honorable James J. Gilvary Symposium on Law, Religion & Social Justice: Evolving Standards of Decency in 2003 – Is the Death Penalty on Life Support?*, 29 U. DAYTON L. REV. 201, 217 (2004) (arguing that *Wiggins* the Court was applying a different standard "that requires lower courts look much more carefully at the performance of counsel, at least in every death penalty case"); Smith, *supra* note ___, at 370 (arguing that the Court in recent ineffective assistance cases has insisted "on a much higher standard of representation by capital defenders").

The Court has also been more willing to engage in fact-specific error correction in capital cases than in noncapital cases. *See, e.g.*, *Dobbs v. Zant*, 506 U.S. 357 (1993) *Gardner v. Florida*, 430 U.S. 349, 357-62 (1977) (invalidating death sentence because defense counsel did not have access to a pre-sentence report); *Caldwell v. Mississippi*, 472 U.S. 320, 328-330 (1985) (invalidating death sentence because prosecution misled jurors about the scope of appellate review and therefore the consequences of their decision).

¹⁵ For instance, although the Court has yet to recognize a noncapital defendant's right to a lesser included offense instruction, it is possible that the Court would ultimately treat these cases similarly and has simply not had the opportunity to issue such a ruling because most jurisdictions

A. *The Sentencer's Discretion*

Perhaps the most fundamental way in which the Court treats death differently than all other sentences is in its concern for the exercise of sentencing discretion. In death cases, it has sought to “develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual.”¹⁶ That is, the Court has sought both to guide discretion and to ensure appropriate individualization. In non-death cases, the Court has made no effort either to control sentencing discretion or to require attention to individual circumstances.

1. *Guided Discretion.* — When the Supreme Court struck down capital punishment as it existed in 1972 in *Furman v. Georgia*,¹⁷ its central concern was avoiding arbitrary and capricious death sentences.¹⁸ The opinions were splintered, but a majority of Justices shared that same basic sentiment.¹⁹

The Court ended the post-*Furman* moratorium on the death penalty only in those states that had, in its view, eliminated the danger of unguided discretion.²⁰ The Court approved those statutes that were “carefully drafted” to “ensure[] that the sentencing authority is given adequate information and guidance.”²¹ It made clear that capital statutes must direct and limit discretion and provide a “meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many cases in which it is not.” The plurality in *Gregg* emphasized that,

already allow these instructions. In contrast, the Court has explicitly rejected the kind of review for noncapital cases that it applies in capital cases in the areas discussed in this section.

¹⁶ *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

¹⁷ 408 U.S. 238 (1972). The Court vacated more than 600 death sentences with its decision in *Furman*. MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 292-293 (1973).

¹⁸ “Central to the limited holding in *Furman* was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments.” *Woodson*, 428 U.S. 280, 302 (1976).

¹⁹ Three Justices concluded that the death penalty was not per se unconstitutional but its arbitrary and capricious imposition was. *See Furman v. Georgia*, 408 U.S. at 256-57 (Douglas, J., concurring) (“discretionary statutes are unconstitutional in their operation” because “[t]hey are pregnant with discrimination”); *id.* at 309 (Stewart, J., concurring) (application of the death penalty is “cruel and unusual in the same way that being struck by lightning is cruel and unusual,”); and *id.* at 313 (White, J., concurring) (“as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice”). Two Justices concluded that these deficiencies rendered the death penalty unfixable and therefore unconstitutional. *Id.* at 293 (Brennan, J., concurring) (noting that application of the death penalty “smacks of little more than a lottery system”); *id.* at 364 (Marshall, J., concurring) (concluding that an informed citizenry would reject capital punishment at least in part because it is “imposed discriminatorily against certain identifiable classes of people”).

²⁰ The Court considered death penalty statutes from five states in 1976. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); and *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976).

²¹ *Gregg*, 428 U.S. at 195 (opinion of Stewart, Powell, and Stevens, J.J.).

in death cases, “discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”²² The capital punishment statute must therefore be narrowly tailored so that defendants convicted under it deserve its punishment and so that it controls against discriminatory application.²³

To enforce this principle, the Court has required states imposing the death penalty to define death-eligible crimes in a way that “channel[s] the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’”²⁴ Using this standard, the Court struck down a law that made a defendant eligible for death upon a finding that his conduct was “outrageously or wantonly vile, horrible, and inhuman” because “[a] person of ordinary sensibility could fairly characterize almost every murder” as meeting that standard.²⁵ Jurisdictions must instead provide a finite list of specific aggravating factors to limit the jury’s discretion.²⁶

While capital statutes must now be drafted with some care to guide discretion, noncapital criminal laws are subject to no similar requirements. The Court has emphasized this distinction, noting explicitly that “legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases.”²⁷ Legislatures have made ample use of that freedom. Almost half of all jurisdictions continue to employ indeterminate sentencing that allows judges to select a sentence from within a broad range.²⁸ In addition, federal and state criminal codes typically give prosecutors a wide choice of charges to bring for the same criminal conduct, which further adds to the likelihood of discriminatory application of sentencing in noncapital cases.²⁹ Finally, as Nancy King has observed, in the six states that use jury sentencing

²² 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, J.J.).

²³ Steiker & Steiker, *supra* note 1, at 364-69 (deeming these concerns with overinclusiveness and underinclusiveness as concerns based in desert and fairness, respectively).

²⁴ *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (quoting *Gregg v. Georgia*, 428 U.S. at 198; *Proffitt v. Florida*, 428 U.S. at 253 (opinion of Stewart, Powell, and Stevens, J.J.); and *Woodson v. North Carolina*, 428 U.S. at 303 (opinion of Stewart, Powell, and Stevens, J.J.)).

²⁵ *Godfrey*, 446 U.S. at 428-429 (plurality opinion).

²⁶ As commentators have noted, this is designed to ensure that the death penalty is given only to “the worst of the worst.” Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1604 and n.40 (2001) (citing sources using this phrase).

²⁷ *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion).

²⁸ Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1103 n.79 (2005).

²⁹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001) (noting that “[c]riminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over”).

in noncapital cases, “courts and legislatures have been remarkably unconcerned with the arbitrary exercise of discretion.”³⁰

2. *Individualization*. — In tension with the Court’s insistence that discretion be channeled in capital cases³¹ is its rejection of statutes that mandate death as the punishment for the commission of specified crimes.³² These statutes were written to control the problem of arbitrary jury discretion, but the Court rejected them as inconsistent with the Eighth Amendment’s requirement “that the individual be given his due.”³³ According to the Court, “the character and record of the individual offender and the circumstances of the particular offense [are] a constitutionally indispensable part of the process of inflicting the penalty of death.”³⁴ The Court has therefore held that states may not preclude the sentencer from considering as a mitigating factor “any aspect of a

³⁰ Nancy J. King, *How Different is Death? Jury Sentencing in Capital and Noncapital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 196 (2004). As an example, Professor King cites Virginia, where juries in rape cases can elect a sentence between five years and life. *Id.* at 197.

³¹ Steiker & Steiker, *supra* note ___, at 382 (arguing that the tension between channeling discretion and allowing individualization is “the central dilemma in post-*Furman* capital punishment law”); Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 U. KAN. L. REV. 1039, 1041 (1995) (noting the “identifiable conflict between” guided discretion and individualized sentencing); *Eddings*, 455 U.S. at 111 (“Since the early days of the common law, the legal system has struggled to accommodate these twin objectives.”); James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 5 (2007) (noting the “glaring contradiction between desires for objective legal constraint (sometimes called ‘narrowing’) and for merciful subjective discretion (sometimes called ‘individualization’)”). Several Justices have commented on this tension. *See, e.g.*, *Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988) (plurality opinion); *California v. Brown*, 479 U.S. 538, 544 (1987) (O’Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. at 623 (White, J., concurring in part, dissenting in part, and concurring in the judgments of the Court) (lamenting the Court’s rejection of statutes that mandated the death penalty for certain offenses and its requirement that mitigating factors must be considered because it “invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration”). *Id.* at 631 (Rehnquist, J., concurring in part and dissenting in part) (criticizing individualization requirement on the basis that it “will not eliminate arbitrariness or freakishness in imposition of sentences, but will codify and institutionalize it”). Indeed, it was this conflict that led Justice Blackmun ultimately to conclude that the death penalty could not be administered consistently with the Constitution. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of stay). Two Justices who have found these goals to be incompatible have decided that the individualization requirement must be limited or jettisoned. *See Graham v. Collins*, 506 U.S. 461, 498 (1993) (Thomas, J., concurring) (arguing for “a permanent truce between *Eddings* and *Furman*” by allowing states to channel the discretion of sentencers when they consider mitigating evidence); *Walton v. Arizona*, 497 U.S. 639, 664, (1990) (Scalia, J., concurring in part and concurring in the judgment) (comparing the tension between the guided discretion and individualization requirements to the “inherent tension between the Allies and Axis Powers in World War II” and stating that he “will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer’s discretion has been unlawfully restricted”).

³² *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Sumner v. Shuman*, 483 U.S. 66 (1987).

³³ *Eddings*, 455 U.S. at 112.

³⁴ *Woodson*, 428 U.S. at 304.

defendant's character or record and *any* of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."³⁵ The Court has used "the most expansive terms"³⁶ in describing what mitigating evidence has to be considered; "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."³⁷ Looking at the individual circumstances of the offender and the offense is now "[a] central feature of death penalty sentencing"³⁸ and capital statutes must ensure that sentencing bodies can give effect to mitigating evidence.³⁹

In noncapital cases, in contrast, the Court has found no constitutional problems with mandatory penalties, even the most extreme.⁴⁰ In *Harmelin v. Michigan*,⁴¹ a majority of the Court rejected the defendant's argument that mitigating factors should be considered before a sentence of life without parole is imposed.⁴² Federal and state codes are brimming with laws that limit the introduction of mitigating evidence.⁴³ Mandatory sentencing provisions that take no account of an individual's circumstances or background are commonplace outside the context of the death penalty.

B. Proportionality Review

Another area of major difference between capital and noncapital sentencing at the Court involves proportionality review. The Court has interpreted the Eighth Amendment to ban "not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime

³⁵ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis added). In the case of judicial sentencing, the judge may not elect as a matter of law to exclude from his or her consideration mitigating evidence. *Eddings*, 455 U.S. at 114.

³⁶ *Tennard v. Dretke*, 542 U.S. 274, 284 (2004).

³⁷ *Payne v. Tennessee*, 501 U.S. 808, 822 (1991). *See also* *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse").

³⁸ *Roper*, 543 U.S. at 572.

³⁹ *Penry v. Johnson*, 532 U.S. 782, 804 (2001).

⁴⁰ Although the Court recently made clear that any fact, other than recidivism, that increases the defendant's maximum penalty must be found by a jury, it refused to hold that a fact that established a mandatory minimum sentence must also be found by a jury. *See Harris v. United States*, 536 U.S. 545 (2002). Thus, mandatory minimums are not even subject to the minimal individualizing check of a jury with the power to nullify, let alone the outright prohibition on mandatory punishments that applies in capital cases.

⁴¹ 501 U.S. 957 (1991).

⁴² *Harmelin*, 501 U.S. at 994-995.

⁴³ For a discussion of various limits on the use of mitigating factors in noncapital cases, *see* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. [section II.A.] (forthcoming 2008).

committed.”⁴⁴ An unconstitutionally excessive punishment, according to the Court, is one that either “(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering or (2) is grossly out of proportion to the severity of the crime.”⁴⁵ In the Court’s view, “it is a precept of justice that punishment for crime be graduated and proportioned to offense.”⁴⁶

In capital cases, the Court’s proportionality review is robust. It has categorically ruled out the option of imposing the death penalty as a punishment for some offenses and some offenders. As to offenses, in *Coker v. Georgia*,⁴⁷ the Court held that it would be “grossly disproportionate and excessive punishment”⁴⁸ to allow the death penalty for the rape of an adult; last Term, in *Kennedy v. Louisiana*,⁴⁹ the Court extended this prohibition to disallow the death penalty for the rape of a child. Indeed, in *Kennedy*, the Court said in dictum that it would not allow the death penalty for crimes against individuals that do not involve death.⁵⁰ Even when crimes do involve death, the Court has created limits. In *Enmund v. Florida*,⁵¹ the Court concluded that the Eighth Amendment prohibits capital punishment for someone convicted of felony murder “who does not himself kill, attempt to kill, or intend that a kill take place or that lethal force will be employed,”⁵² unless, as the Court later clarified, the person was a major participant in the felony who evinced “reckless indifference to human life.”⁵³ As to offenders, the Court has

⁴⁴ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

⁴⁵ *Id.*

⁴⁶ *Weems v. US*, 217 U.S. 349, 366-367 (1910). *See also* *Solem v. Helm*, 463 U.S. at 290 (“[A]s a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted.”). Although some Justices have indicated that they believe the Eighth Amendment does not contain a proportionality principle, *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (Scalia, J., joined by Chief Justice Rehnquist); *Ewing*, 538 U.S. at 32 (Thomas, J., concurring in the judgment), that view has not been accepted by a majority of the Court.

⁴⁷ 433 U.S. 584 (1977)

⁴⁸ 433 U.S. at 592. The Court noted that “Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the victim is an adult woman,” *id.* at 595-96, and that nine out of ten juries in Georgia did not impose a death sentence in rape cases. *Id.* at 597.

⁴⁹ 128 S.Ct. 2641 (2008).

⁵⁰ *Kennedy v. Louisiana*, slip op. at 15 26-27 (“As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken.”). The Court seems more willing to condone capital punishment for crimes “against the State” that do not result death. Curiously, the Court included in that category not only crimes like treason, espionage and terrorism, but “drug kingpin activity,” *id.* at 26, which calls into question how the Court defines crimes against individuals versus crimes against the State.

⁵¹ 458 U.S. 782 (1982).

⁵² 458 U.S. at 797.

⁵³ *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

disallowed the death penalty for juveniles under the age of 18 at the time of their offense,⁵⁴ the mentally retarded,⁵⁵ and the insane.⁵⁶

In stark contrast, the Court has been steadfast in its refusal to police disproportionate sentences outside the capital context.⁵⁷ It has created no categorical rules exempting some offenders or offenses from particular punishments. Quite the opposite, the Court believes that only a “‘narrow proportionality principle’ . . . ‘applies to noncapital sentences,’”⁵⁸ and it has established a test for establishing an unconstitutionally disproportionate sentence in noncapital cases that is more difficult than the approach it uses in capital cases. In capital cases, the Court will engage in an inter-jurisdictional comparison to see how other jurisdictions treat the crime at issue and an intra-jurisdictional comparison to see how the same jurisdiction treats other crimes in relation to the crime at issue.⁵⁹ The Court also conducts its own independent assessment to see if the gravity of the offense and the culpability of the offender justify a sentence of death regardless of the consensus.⁶⁰ For noncapital cases, the Court will not conduct either the inter-jurisdictional or the intra-jurisdictional comparisons without first finding as a threshold matter that the sentence is grossly disproportionate for the crime.⁶¹ In making the threshold

⁵⁴ *Roper v. Simmons*, 543 U.S. 551 (2005). The Court in *Roper* overruled its decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which held that the Constitution did not prohibit the death penalty for juvenile offenders aged 16 or 17.

⁵⁵ *Atkins v. Virginia*, 536 U.S. 304, 350 (2002). The Court thereby overruled its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), in which it refused to create a categorical exemption for the mentally retarded.

⁵⁶ *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁵⁷ Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 445 (2004) (noting that outside of the capital context, “proportionality review has been virtually dormant”); *Enmund v. Florida*, 458 U.S. at 815 n.27 (O’Connor, J., dissenting) (conceding that “[t]he Court has conducted a less searching inquiry for punishments less than death”).

⁵⁸ *Ewing v. California*, 538 U.S. 11, 20 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-997 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

⁵⁹ Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 689 and nn. 52-53 (2005) (citing Court decisions using this test).

⁶⁰ Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 689 and n. 54 (2005) (citing Court decisions using this test). For a recent example, see *Kennedy v. Louisiana*, 554 U.S. ___ (2008); slip op. at 10 (noting that the Court’s “own independent judgment” supports its holding that it is unconstitutional to impose a death sentence for one who rapes a child).

⁶¹ *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment) (“intra-jurisdictional and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality”); *Ewing*, 538 U.S. at 23-24 (endorsing the approach Justice Kennedy established in *Harmelin*). Although the Court has not adopted a majority view on how to approach noncapital cases, the current test seems to be one adopted by the plurality opinion in *Ewing v. California*. Lee, *supra* note ___, at 693 (calling Justice Kennedy’s concurring opinion in *Harmelin* the one “that eventually came to assume the status of law”); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 699 (1998) (“Justice Kennedy’s circumscribed view of *Solem* has emerged

determination of whether a sentence is grossly disproportionate, the Court will uphold a sentence so long as the state has a “reasonable basis for believing” that it will serve either deterrent, retributive, rehabilitative, or incapacitative goals.⁶²

This test has been widely criticized for its weak enforcement of the Eighth Amendment standard and its subjectivity. It has been described as “a standardless threshold test, which in effect allows federal courts to withhold proportionality review from noncapital sentences whenever it fits their personal or policy goals.”⁶³ “Because it is lacking in firm guidelines,” the test “could permit judicial, and therefore constitutional, approval of some bizarre and grotesque criminal sentences.”⁶⁴ Because the Court will not look to comparable sentences elsewhere before making this threshold determination, the Court may fail to appreciate just how excessive a sentence is.⁶⁵

To say that the Court has been reluctant outside of the capital context to find sentences grossly disproportionate would be a grossly disproportionate understatement. Consider some of the sentences that the Court has upheld. In *Ewing v. California*, the Court condoned a sentence of 25 years to life under California’s three-strikes law for a recidivist who stole three golf clubs worth approximately \$1200.⁶⁶ California and the United States in an amicus brief supporting the sentence could cite but a single example of another offender who received a similar sentence outside of California – and that is out of a prison population at the time that almost reached two million individuals.⁶⁷ Only non-recidivist, first-degree murderers are treated to comparable punishment in California,⁶⁸ and none of the briefs in *Ewing* even made an attempt to justify the

as the operative test for proportionality”). This test therefore replaces the three-part inquiry of *Solem* to determine if a sentence was excessive. *Solem*, 463 U.S. at 301.

⁶² *Ewing*, 538 U.S. at 28 (plurality opinion). Youngjae Lee refers to this standard as “the disjunctive theory” because the Court does not look simply at retributive justice in assessing whether a punishment is disproportionate, but allows the jurisdiction to choose from a variety of punitive purposes. Lee, *supra* note __, at 682-683. Professor Lee has persuasively explained why this disjunctive theory is incompatible with the Eighth Amendment. After all, sentences that the Court unquestionably recognizes as violating the Eighth Amendment like the rack, public dissection, and the stretching of limbs, could serve deterrent purposes quite effectively, but the Court has nevertheless rejected them. *Id.* at 706. Similarly, the sentences in *Weems* and *Coker* could have been justified on deterrence grounds, but the Court did not credit such arguments. *Id.*

⁶³ G. David Hackney, *A Trunk Full of Trouble: Harmelin v. Michigan*, 111 S.Ct. 2680, 27 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 262, 276 (1992).

⁶⁴ Peter Mathis Spett, *Confounding the Gradations of Iniquity: An Analysis of Eighth Amendment Jurisprudence Set Forth in Harmelin v. Michigan*, 24 COLUM. HUM. RTS. L. REV. 203, 228-231 and n.126 (1992/1993).

⁶⁵ “It is only after looking at the objective factors of the *Solem* test that the truly excessive character of Harmelin’s sentence is evident.” G. David Hackney, *A Trunk Full of Trouble: Harmelin v. Michigan*, 111 S.Ct. 2680, 27 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 262, 278 (1992).

⁶⁶ *Ewing*, 538 U.S. at 18.

⁶⁷ *Id.* at 47.

⁶⁸ *Id.* at 44 (Breyer, J., dissenting)

sentence under a retributive theory.⁶⁹ Indeed, five Justices in that case agreed that the sentence was disproportionate.⁷⁰

Andrade, the companion case to *Ewing* that involved a habeas challenge to a sentence under the same California law, involved an even more disproportionate punishment. Andrade's first strike was a petty misdemeanor theft and strikes two and three were two separate incidents of video theft at two different Kmart stores, one involving five videotapes worth roughly \$85 and another two weeks later involving four videotapes worth a little less than \$70. These crimes yielded Andrade a sentence of 50 years to life.⁷¹ Because Andrade's challenge was on habeas review, he had to show that his sentence violated clearly established law. The Court found that it was clearly established law that "[a] gross disproportionality principle is applicable to sentences for terms of years,"⁷² but it concluded that the state court was not objectively unreasonable when it affirmed Andrade's sentence.⁷³ As the dissent put it, "[i]f Andrade's sentence is not grossly disproportionate, the principle has no meaning."⁷⁴

Additional cases likewise demonstrate the Court's lack of proportionality oversight in noncapital cases. In *Rummel v. Estelle*, the Court approved a mandatory life sentence for a defendant who had committed three separate low-level theft offenses that together totaled less than \$230.⁷⁵ According to the majority in *Rummel*, "the length of the sentence actually imposed is purely a matter of legislative prerogative" in felony cases.⁷⁶ The Court took this notion of deference seriously in *Hutto v. Davis*, in which it upheld a 40-year sentence and \$20,000 fine for a defendant convicted of possessing with the intent to distribute nine ounces of marijuana. In *Harmelin*, the Court upheld a mandatory life sentence without parole for a first-time offender in Michigan

⁶⁹ *Ewing*, 538 U.S. at 51-52 (Breyer, J., dissenting).

⁷⁰ That was the basis for the dissenting votes of four Justices, *Ewing*, 538 U.S. at 37 (Breyer, J., dissenting) ("punishment is 'grossly disproportionate' to the crime"), and Justice Scalia's concurrence conceded "in all fairness" that the plurality opinion "does not convincingly establish that 25-years-to-life sentence is a 'proportionate' punishment for stealing three golf clubs." *Id.* at 31 (Scalia, J., concurring in the judgment). *Ewing* lost because three Justices thought the sentence was proportionate and because Justices Scalia and Thomas share the view that only modes of punishment, not disproportionate sentences, can violate the Eighth Amendment's prohibition on cruel and unusual punishment. *See id.* at 31 (Scalia, J., concurring in the judgment); *See id.* at 32 (Thomas, J., concurring in the judgment).

⁷¹ *Lockyer v. Andrade*, 538 U.S. 63, 66 (2003).

⁷² *Andrade*, 538 U.S. at 72.

⁷³ *Id.* at 76.

⁷⁴ *Andrade*, 538 U.S. at 83 (Souter, J., dissenting).

⁷⁵ *Rummel's* first offense was to fraudulently use a credit card in the amount of \$80. His second offense was to pass a forged check in the amount of \$28.36. His third offense, which triggered the life sentence, was obtaining \$120.75 under false pretenses. *Id.* at 265-66.

⁷⁶ 445 U.S. at 274.

charged with possessing 672 grams of cocaine.⁷⁷ Alabama was the only other state that authorized a mandatory life sentence for a first-time drug offense, and its law required a minimum of 10 kilograms of cocaine to trigger the sentence.⁷⁸ The Court nevertheless had no problems upholding the sentence, with three Justices finding no proportionality problem with the sentence and Justices Scalia and Thomas refusing to recognize that the Eighth Amendment requires proportionality review at all in noncapital cases.

Indeed, the Court has rejected noncapital sentences in only a small handful of cases, all of which are decades old and all but one of which involve facts that go beyond the term of incarceration. The Court first rejected a noncapital sentence as cruel and unusual in 1910 in *Weems*,⁷⁹ which was also the first case in which the Court recognized that disproportionately excessive punishments violate the Eighth Amendment.⁸⁰ In *Weems*, the Court rejected a sentence of 15 years for a public official in the Philippines who falsified an official document.⁸¹ But the sentence in *Weems* went beyond incarceration. The defendant was sentenced under the Philippine law of *cadena temporal*, which required the defendant to “always carry a chain at the ankle, hanging from the wrists” and to “be employed at hard and painful labor.”⁸² The defendant was fined, and his sentence included various collateral consequences as well, including the loss of parental rights, the loss of voting rights, and “subjection to surveillance during life.”⁸³ The Court has since distinguished *Weems* on the basis of “the extraordinary nature of the ‘accessories’ included within the punishment of *cadena temporal*.”⁸⁴

The Court did not strike down another punishment under the Eighth Amendment for forty years, when a plurality of the Court in *Trop v. Dulles* rejected a sentence of expatriation for wartime desertion.⁸⁵ Shortly thereafter,

⁷⁷ 501 U.S. at 961.

⁷⁸ *Harmelin*, 501 U.S. at 1026 (White, J., dissenting).

⁷⁹ See *Enmund*, 458 U.S. at 812 (O’Connor, J., dissenting) (noting that “[t]he Eighth Amendment concept of proportionality was first fully expressed in *Weems*”). The Court faced an Eighth Amendment challenge to a noncapital case prior to *Weems*, but the Court rejected the challenge on the ground that the Eighth Amendment did not apply to the states. *O’Neil v. Vermont*, 144 U.S. 323 (1892). Justices Field, Harlan, and Brewer dissented in *O’Neil*, finding that the Eighth Amendment did apply to the states and that the sentence at issue in the case was excessive. As the dissenters in *O’Neil* put it, “[t]he whole inhibition” of the Eighth Amendment “is against that which is excessive.” *Id.* at 340 (Field, J., dissenting). *Weems* vindicated the dissent’s view of proportionality, and *Robinson v. California*, 370 U.S. 660 (1962), vindicated the view that the Eighth Amendment applies to the states. After *Weems*, the Court did not declare another punishment to be disproportionate in violation of the Constitution until *Coker*. *Id.* at 813.

⁸⁰ *Weems v. United States*, 217 U.S. 349, 367 (1910).

⁸¹ *Id.* at 362-63.

⁸² *Id.* at 364.

⁸³ *Id.* at 364-66.

⁸⁴ *Rummel*, 445 U.S. at 274.

⁸⁵ *Trop v. Dulles*, 356 U.S. 86 (1958).

in *Robinson v. California*, the Court held that any term of imprisonment for the “crime” of addiction was cruel and unusual.⁸⁶ Like *Weems*, both of those cases are distinguishable from a run-of-the-mill challenge to a term of incarceration. *Trop* involved a challenge to expatriation, not a term of imprisonment, and although the Court in *Robinson* rejected a term of imprisonment for addiction, its core concern was with the legislature’s power to define addiction as a crime at all, not proportionality.⁸⁷

There has been only a single case in the Court’s history in which a term of incarceration, standing alone, was held to be disproportionate to an otherwise validly defined crime. In 1983, in *Solem v. Helm*, the Court found unconstitutional a mandatory life sentence without the possibility for parole for a defendant who wrote a “no-account” check for \$100 that was his seventh nonviolent felony.⁸⁸ It was “the most severe punishment that the State could have imposed on any criminal for any crime,”⁸⁹ and there was no evidence that anyone else in any jurisdiction had ever been given the same sentence for comparable crimes.⁹⁰ But the case now stands as an outlier, with the subsequent cases of *Harmelin*, *Ewing*, and *Andrade* making clear that “proportionality has become virtually meaningless as a constitutional principle.”⁹¹

The Court has also failed to enforce the principle of proportionality as it relates to less culpable offenders. While the Court disallows the execution of an individual under the age of 18 because it views those individuals as lacking the culpability of an adult, it has not insisted that an offender’s age be taken into account for any other type of sentence. Indeed, the Court has not disapproved of sentences of life without parole for children as young as 13,⁹²

⁸⁶ *Robinson v. California*, 370 U.S. 660 (1962).

⁸⁷ See *id.* at 666 (noting that addiction, like mental illness, leprosy, or venereal disease, could be dealt with by compulsory treatment that involved confinement, but that it could not be made a criminal offense consistent with the Eighth Amendment); *id.* at 676 (Douglas, J., concurring) (“[c]ruel and unusual punishment results not from confinement, but from convicting the addict of a crime”); *id.* at 679 (Harlan, J., concurring) (noting that the flaw with the jury instruction was that it “authorize[d] criminal punishment for a bare desire to commit a criminal act”).

⁸⁸ *Solem v. Helm*, 463 U.S. 277, 279 (1983).

⁸⁹ *Id.* at 297.

⁹⁰ *Id.* at 299. Indeed, only one state (Nevada) even authorized such a sentence, and there was no evidence that anyone had received that penalty there. *Id.* 299-300.

⁹¹ Lee, *supra* note ___, at 695.

⁹² Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 539 (2003) (noting that “the Court has not set any minimum age for imposing sentences of life without parole on younger offenders”); *id.* at 541 (observing that courts rarely invalidate juvenile sentences as constitutionally excessive); Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children To Die in Prison*, available at <http://eji.org/eji/> (cataloging cases of 13 and 14-year-olds serving life sentences).

even if those sentences are mandatory and imposed on juveniles without any individualized assessment of culpability.⁹³

The Court has similarly ignored the lesser culpability of the mentally retarded in noncapital cases. Before it completely disallowed the execution of the mentally retarded in 2002,⁹⁴ the Court insisted that mental retardation be considered as a mitigating factor in capital cases.⁹⁵ In noncapital cases, in contrast, the Court has not yet recognized that mental retardation must be considered at all – either as a bar to punishment or as a mitigating factor. Instead, the Court has left it up to each jurisdiction how it wishes to treat mental retardation at sentencing.⁹⁶ As a result, the mentally retarded can be sentenced to life without parole or other harsh mandatory sentences without an opportunity to present their mental condition as a mitigating factor that reduces their sentence.⁹⁷

⁹³ Most states, in fact, authorize life without parole for juveniles. Adam Liptak, *No Way Out: The Youngest Lifers Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1. And more than half of the states impose mandatory sentences of life without parole based on the commission of certain crimes, regardless of whether one is a juvenile. Human Rights Watch, Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 25 n.44 (2005), available at <http://www.amnestyusa.org/countries/usa/clwop/report.pdf>. The Ninth Circuit's decision in *Harris v. Wright*, 93 F.3d 581 (1996), is typical of how lower courts have analyzed such claims. The Court, citing *Harmelin*, noted that “while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer.” *Id.* at 585.

⁹⁴ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁹⁵ *Penry*, 492 U.S. at 328.

⁹⁶ Many states have, in turn, passed sentencing legislation that recognizes mental retardation as a mitigating factor or that exempts them from otherwise applicable mandatory minimum sentences. Timothy Cone, *Developing the Eighth Amendment for Those “Least Deserving” of Punishment: Statutory Minimums for Noncapital Offenses Can Be “Cruel and Unusual” When Imposed on Mentally Retarded Offenders*, 34 N.M. L. REV. 35, 44 (2004). Other jurisdictions, however, have not provided an opportunity for mental retardation to be considered as a mitigating factor, and courts have upheld those choices. *See, e.g.*, *United States v. Laffoon*, 145 Fed.Appx. 964, 965, 2005 WL 2044859 (C.A.5 (Tex.)) (upholding mandatory minimum sentence under 18 U.S.C. § 924(c) even though defendant's mental retardation was not considered because “[w]ith the exception of a capital sentence, the imposition of a mandatory sentence without consideration of mitigating factors does not violate the Eighth Amendment's prohibition against cruel and unusual punishment”).

⁹⁷ It is less clear that there is a different rule in capital cases than noncapital cases for the insane. Although the Supreme Court has not held that an inmate who becomes insane during his or her confinement must be transferred to a mental facility and no longer incarcerated as a form of punishment, this may be because the issue has not arisen by virtue of the fact that the states seem to respect this fact. *See, e.g.*, *Ex Parte Elkins*, 324 S.W.2d 1, 2 (Tex. Crim. App. 1959) (holding that if a defendant had become insane since his incarceration, he was entitled to a transfer to a mental hospital under Texas law); *People v. White*, 251 N.Y.S. 396, 398 (N.Y. Gen. Term. 1931) (holding that, under New York law, a defendant could not be “sentenced to any punishment or punished for a crime while he is in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding or making his defense”). That said, the huge number of mentally ill inmates could lead one to believe that there are inevitably mentally insane individuals currently serving terms of incarceration. *See* Bernard E. Harcourt, *The*

Finally, although the Court insists that a defendant's individual participation in a felony must be considered in determining whether a death sentence is appropriate for felony murder,⁹⁸ it has not imposed the same requirement in any felony murder case involving a sentence other than death, even life without parole. Justice Kennedy's concurrence in *Harmelin* summed up what appears to be the prevailing view on the Court, that "the crime of felony murder without specific intent to kill . . . [is] a crime for which no sentence of imprisonment would be disproportionate."⁹⁹

Thus, whether it comes to offenses or offenders, the Court's proportionality review differs markedly in capital and noncapital cases. The Court has struck down a host of state laws attempting to impose capital punishment because it found them to be disproportionate. But out of the millions upon millions of noncapital sentences imposed, the Court has found only one to be disproportionate, and that lone occurrence was more than 25 years ago.

II. THE TWO-TRACK SYSTEM AND THE CONSTITUTION

In all of the cases in which the Court carved out special rights for capital defendants, it grounded its decision on the argument that "death is a punishment different from all other sanctions in kind rather than degree."¹⁰⁰ One can hardly argue with the Court's claim that death is a different kind of punishment. But that is not the relevant question. The key issue is whether the fact that death is a different kind of punishment justifies creating a different set of rights that belong only to capital defendants. Put another way, the Court's claim of difference must be analyzed to determine whether it is not merely factually true, but legally significant.

This Part explores whether there is a constitutional basis for the distinctions discussed in Part I. After explaining in section A the lack of

Mentally Ill Behind Bars, N.Y. TIMES, Jan. 15, 2007 at A15 (citing Justice Department study from 2007 finding that "56 percent of jail inmates in state prisons and 64 percent of inmates across the country reported mental health problems within the past year"). This is particularly likely given Bernard Harcourt's findings showing that the drop in institutionalization in mental hospitals in the United States correlates with the rise in institutionalization in prisons. Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution – Part II: State Level Analysis*, University of Chicago Law & Economics, Olin Working Paper No. 335, 1 (March 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970341 (noting that "deinstitutionalization brought a radical diminution of [the mental hospital and asylum] population, but it coincided with a sharp increase in our prison populations, which reached 600 inmates in state and federal prisons per 100,000 adults in 2000").

⁹⁸ *Enmund*, 458 U.S. at 798 ("The focus must be on [the defendant's] culpability, not on those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'"); *id.* at 801 ("Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.").

⁹⁹ *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring).

¹⁰⁰ *Woodson*, 428 U.S. at 303-304 (plurality opinion).

support for the two-track system in the text or history of the Constitution, section B considers the Court's functional arguments for concluding that there is one set of constitutional rules for death and another for everything else. Section B explains that the Court's concerns with the finality and severity of death fall short of supporting its separate jurisprudence for capital cases. Section C then considers each of the substantive areas in which death has been given preferential treatment to determine if there are additional arguments for treating these particular contexts differently that go beyond the gravity and finality claims the Court typically uses.

A. *The Traditional Means of Constitutional Interpretation*

The Court's decisions prohibiting arbitrariness, requiring individualization, and ensuring proportionality are grounded in the Eighth Amendment, which prohibits the infliction of "cruel and unusual punishments."¹⁰¹ There is no hint in the text itself that these terms should mean one thing in capital cases and another in noncapital cases.¹⁰² The Court, for its part, seems to concede as much, for it has stated that "[t]he Eight Amendment is not limited in application to capital punishment, but applies to all penalties."¹⁰³ It has interpreted "cruel and unusual punishment" to mean those punishments that are barbaric as well as those that are excessive in relation to the crime committed.¹⁰⁴ Whether a crime is barbaric or excessive is assessed in light of historical treatment as well as contemporary standards of decency.¹⁰⁵ A majority of the Court has recognized that noncapital punishments, such as terms of confinement, can be cruel and unusual.¹⁰⁶ In other words, the Court as a matter of interpretation and

¹⁰¹ U.S. CONST. amend. VIII. The Eighth Amendment's prohibition on cruel and unusual punishment applies to the states by incorporation into the Fourteenth Amendment. *Woodson v. North Carolina*, 428 U.S. 280, 287 n.8 (1976) (citing *Robinson v. California*, 370 U.S. 660 (1962)). To the extent that Fourteenth Amendment concerns underlay the Court's decisions, it, too, applies to both contexts. As Justice Clark stated in his concurring opinion in *Gideon*, "[t]he Fourteenth Amendment requires due process of law for the deprivation of 'liberty' just as for the deprivation of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved." *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963) (Clark, J., concurring).

¹⁰² As Jeremy Waldron has explained, there is an important difference between the words contained in the Constitution and how those words are then applied by Courts, and focusing on the meaning of the text as an independent inquiry is a valuable starting place for analysis. Jeremy Waldron, *Inhuman and Degrading Treatment: A Non-Realist View* 7-8, 10-13 available at <http://www1.law.nyu.edu/colloquia/conlaw/waldron.pdf>. Focusing on the words themselves, there is nothing to support different meanings in capital versus noncapital contexts.

¹⁰³ *McCleskey v. Kemp*, 481 U.S. 279, 314-15 (1987).

¹⁰⁴ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹⁰⁵ *Trop*, 356 U.S. at 101 (plurality opinion) (Eighth Amendment should be based on "evolving standards of decency that mark the progress of a maturing society"); *Woodson*, 428 U.S. at 288 (noting that "indicia of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations").

¹⁰⁶ *Atkins*, 536 U.S. at 311 n.7 ("[W]e have read the text of the amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.").

doctrinal implementation agrees with the text of the Amendment itself that there is a single meaning of the Eighth Amendment that applies to all criminal cases.¹⁰⁷

History confirms this textual reading of the Eighth Amendment. Until the Court's "death is different" jurisprudence emerged in the 1970s, the Court recognized the same rights for capital and noncapital defendants.¹⁰⁸ Indeed, that is why the Court has not attempted to refute the charge that "[n]one of the [substantive and procedural requirements imposed under the death-is-different rationale] existed when the Eighth Amendment was adopted."¹⁰⁹

The argument for the Court's death-is-different jurisprudence therefore springs from functional arguments about why death must be treated differently. But even on this basis, as the next sections explain, the Court's rationale comes up short.

B. *The Functional Case for Treating Death Differently*

Perhaps recognizing the lack of a traditional constitutional anchor for a separate set of constitutional rights for capital defendants, the Court has instead emphasized the attributes of the death penalty that distinguish it from other punishments, specifically focusing on the gravity and finality of a death sentence.¹¹⁰ There has been surprisingly little in the Court's opinions that unpacks these concepts with any care or that considers how these concepts apply to noncapital sentences.¹¹¹

Justice Brennan's concurring opinion in *Furman* provides the most thorough argument for the Court's special concern with capital cases, and the Court's other death-is-different cases have echoed the themes he raised in his

¹⁰⁷ The same would be true of a due process analysis. "The Due Process Clause admits of no distinction between the deprivation of 'life' and the deprivation of 'liberty.'" *Furman*, 408 U.S. at 447 (Powell, J., dissenting).

¹⁰⁸ To be sure, there were suggestions that a heightened standard should apply when a defendant faced a death sentence. For instance, in *Powell v. Alabama*, 287 U.S. 45, 71 (1932), the Court noted that the defendants were facing death when it stated they required counsel. But the Court ultimately made clear that the state must provide counsel to all criminal defendants in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Before *Furman*, the Court never explicitly held that there was a separate constitutional standard for death, nor did it attempt to provide a justification for the special treatment.

¹⁰⁹ *Atkins*, 536 U.S. at 352-53.

¹¹⁰ As Justice O'Connor has put it, the Court mandates "a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality." *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring in the judgment).

¹¹¹ *Steiker & Steiker, supra note __*, at 398 ("Although certain themes unite some of the decisions, such as 'truth' in sentencing and the need for collateral procedures in extraordinary cases, the Court has not explained precisely how death is different from all other punishments other than to reassert that death is final and severe."). See, e.g., *Gregg*, 428 U.S. at 187; *Enmund*, 458 U.S. at 797.

opinion.¹¹² On closer inspection, these claims fail to support the Court's unwillingness to police noncapital sentencing on the same grounds as capital cases.

Consider first Justice Brennan's emphasis on the public's different view toward death as compared to other punishments. Justice Brennan begins his discussion of the uniqueness of death by pointing out that "[t]here has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death."¹¹³ He notes that "[n]o other punishment has been so continuously restricted," nor abolished, as capital punishment had been abolished in many states.¹¹⁴ What Justice Brennan said in 1972 is still true today. We still have not had a serious national dialogue on criminal punishment outside of the death penalty context. Instead, politicians pass ever tougher sentencing laws with virtually no discussion or consideration about the wisdom or effectiveness of those policies.¹¹⁵ And, as Justice Brennan noted, whereas the history of the death penalty is one of restricting eligible offenders and offenses, the story of most other criminal punishments is the opposite. Most sentences have been lengthened and most categories of crime expanded.¹¹⁶ For instance, during the same period in which numerous states increased the age at which a juvenile could be subjected to the death penalty,¹¹⁷ they were also enacting stricter juvenile justice laws that transferred younger offenders into adult court¹¹⁸ and subjected them to mandatory minimum sentences.¹¹⁹

¹¹² Steiker & Steiker, *supra* note ___, at 370 (noting that Justice Brennan "singlehandedly constructed the now-familiar 'death is different' argument").

¹¹³ *Furman*, 408 U.S. at 286.

¹¹⁴ *Id.*

¹¹⁵ *See, e.g.*, Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1278 (2005) (noting that federal and state political dialogue over criminal punishment is one-sided and not a model of rationality); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2556-2558 (2004) (explaining why legislators have an incentive "to vote for rules that even the legislators themselves think are too harsh"); Sara Sun Beale, *Rethinking Federal Criminal Law: What's Law Got to Do With It? The Political, Social, Psychological, and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 32-64 (1997) (outlining the ways in which the media and human psychology affect political discourse surrounding crime).

¹¹⁶ Erik Luna, *The Overcriminalization Phenomenon*, 54 AM U. L. REV. 703, 703 (2005) (noting that "[e]very year, additional crimes, increased punishments, and novel applications of the criminal justice system enter U.S. jurisprudence"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512-517 (2001) (describing the tremendous expansion of criminal law throughout its history).

¹¹⁷ *See* Brief of New York, Iowa, Kansas, Maryland, Minnesota, New Mexico, Oregon, and West Virginia as Amici Curiae in Support of Respondent, *Roper v. Simmons*, 18-24 July 19, 2004 (describing the contemporaneous trends of more states making juvenile offenders criminally liable at younger ages while at the same time increasing to 18 the minimum age at which an offender could be death-eligible).

¹¹⁸ Howard N. Snyder and Melissa Sickmund, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1999 National Report* 89, 104 (1999), available at <http://www.ncjrs.org/html/ojjdp/nationalreport99/> (Sept.

While Justice Brennan marshals these differences to support his claim that the evolving standards of society show reluctance about the imposition of the death penalty, these same facts buttress the view that the Court should, if anything, be even more vigilant in providing judicial protection against majoritarian abuse in noncapital cases.¹²⁰ The political process has failed to treat noncapital sentencing with care. While some legislatures have cabined the sentencing authority's discretion through the enactment of sentencing guidelines, many jurisdictions still leave sentencing to the absolute discretion of the trial judge and a few give wide sentencing discretion to jurors.¹²¹ The Court has made no effort to ensure that this discretion is properly channeled in noncapital cases. The lack of serious political debate about noncapital sentencing also means that sentences are frequently disproportionate because elected officials spend little time crafting laws with precision, drafting instead overbroad laws that sweep within their purview offenders and conduct that should not be subject to the sentence mandated by the statute. Mandatory sentencing provisions create similar risks by failing to take into account an individual's culpability, yet legislatures continue to pass these laws with little thought or debate. Following Justice Brennan's lead and looking at the political process therefore lends support for Court oversight in noncapital cases. The political process fails to take noncapital sentencing seriously, and the result is a host of arbitrary, disproportionate punishments that fail to take into account an individual's circumstances. The judiciary is the only possible check on the excessive punishments that emerge from a democratic process that fails to give noncapital sentencing rational consideration.¹²²

Instead of correcting these failings, however, the Court follows the lead of the public and the political process and focuses its attention exclusively on the death penalty because of its "extreme severity."¹²³ Death is unquestionably more severe than other punishments, but does the greater severity of death justify constitutional protections that are unavailable to defendants facing any other criminal punishment? Here, too, the argument for treating death differently falls short, regardless of which measure of severity is used.

1999) (referring to the 1990s as "a time of unprecedented change as State legislatures cracked down on juvenile crime" and noting that 45 states during the 90s made it easier to transfer juveniles to the adult system); Julian V. Roberts, *Public Opinion and Youth Justice*, 31 CRIME & JUST. 495, 521 (2004).

¹¹⁹ Howard N. Snyder and Melissa Sickmund, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1999 National Report* 89, 108 (1999), available at <http://www.ncjrs.org/html/ojjdp/nationalreport99/> (Sept. 1999)

¹²⁰ See *infra* TAN __-__.

¹²¹ King, *supra* note __, at 197.

¹²² See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing that the Court's constitutional jurisprudence must ensure that everyone's interests are represented when decisions are made and correct political process failures).

¹²³ *Id.* at 287.

Justice Brennan begins his discussion of severity with a focus on the pain of death. Death, he notes, “remains as the only punishment that may involve the conscious infliction of physical pain.”¹²⁴ While there is no denying that the actual imposition of capital punishment may involve tremendous physical pain and discomfort,¹²⁵ there is scant evidence that jurisdictions aim to inflict pain as part of an execution. Quite the opposite, jurisdictions have sought to make the actual killing of a capital defendant an antiseptic and relatively painless procedure,¹²⁶ even if they have not succeeded.¹²⁷

In contrast, jurisdictions have made few efforts to minimize the pain associated with incarceration.¹²⁸ The levels of brutality and abuse in the Nation’s prisons are high.¹²⁹ Prisons are drastically overcrowded and prisoners

¹²⁴ *Id.* at 288.

¹²⁵ See, e.g., Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research of Prisoners*, 45 AM. CRIM. L. REV. 1101, 1106-1108 (2008) (describing examples of problems and pain caused to inmates as a result of lethal injections); Kenneth C. Haas, *The Emerging Death Penalty Jurisprudence of the Roberts Court*, 6 PIERCE L. REV. 387, 437-438 (2008) (describing problems with lethal injections).

¹²⁶ See *Baze v. Rees*, Brief for Fordham University School of Law et al. as Amici Curiae in Support of Petitioners, 2007 U.S. Briefs 5439, 2-3 (“The history of execution methods in the United States demonstrates an evolving moral and legal consensus toward seeking out methods of execution that are humane and free from unnecessary pain. States have sought to introduce more humane methods of execution when the actual implementations of particular methods... were scrutinized and shown to be barbaric or open to a high risk of unnecessary error and pain relative to other available options.”); *Baze v. Rees*, 128 S. Ct. 1520, 1526-1527 and n.1 (2008) (explaining that electrocution was adopted as a method of execution because it was thought to be more humane than hanging and that states to lethal injection “to find a more humane alternative to then-existing methods” *Baze v. Rees*, 128 S. Ct. 1520, 1527 (n.1) (2008).

¹²⁷ The Supreme Court has made clear that a showing of the deliberate infliction of pain in administering the death penalty would render it unconstitutional. *Id.* at 1530.

¹²⁸ For an in-depth discussion of the pain associated with incarceration, see Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 116-138 (2007). To challenge their prison conditions as cruel and unusual, prisoners must show that prison officials have a subjective intent to create harmful circumstances. See, e.g., *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (requiring a showing of deliberate indifference to conditions); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (requiring a showing of deliberate indifference to medical needs of inmates); *Hudson v. McMillian*, 403 U.S. 1, 10 (1991) (insisting that prisoners challenging abuse by a guard must demonstrate the guard employed excessive physical force “maliciously and sadistically for the very purpose of causing harm”). This Court-imposed subjective intent requirement is partly responsible for the physical abuse in America’s prisons because it makes a successful challenge to these conditions so difficult. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 60 (2003) (noting the subjective intent requirement is a “real bar to litigation over objectively bad prison conditions”); MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* 49 (1998) (explaining that *Wilson v. Seiter* “appears to raise a substantial barrier to Eighth Amendment suits against state prisons”); Nilsen, *supra* note ___, at 145-146 (“intent-based test allows courts to entirely ignore the realities of prison life”). Specifically,

¹²⁹ See Nilsen, *supra* note ___, at 123-127 (describing the violence and abuse that characterize imprisonment and how it makes fear “a prisoner’s constant companion from the beginning to the end of his prison sentence”); Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* 29-30, 42-43 (2001), available at

face violence from other prisoners as well as from guards.¹³⁰ It has been estimated that as many as 70 percent of all inmates are assaulted by other inmates.¹³¹ Although the prevalence of prison rape cannot be stated with precision,¹³² it is a fact of prison life for many.¹³³ Indeed, the legislative history of the Prison Rape Elimination Act of 2003 found that more than a million prisoners had been sexually assaulted in prison over the twenty-year period it studied.¹³⁴ Far from seeking to limit this pain, the Court has been deferential to claims by prison officials that harsh practices are necessary for the effective management of the institution.¹³⁵ Incarceration, then, provides its own brand of physical pain.

But it is not just the physical pain associated with death that may make it different in kind from other punishments, for “mental pain is an inseparable part of our practice of punishing criminals by death.”¹³⁶ As Justice Brennan notes, “the inevitable long wait between the imposition of sentence and the actual infliction of death” can amount to “psychological torture.”¹³⁷ Again, there is no denying the mental anguish and terror that exists on death row. But one also cannot deny the psychological trauma that characterizes many noncapital sanctions. For example, some inmates are placed in solitary confinement, either as a matter of course in some supermax facilities or on a

<http://files.findlaw.com/news.findlaw.com/cnn/docs/hrw/hrwmalerape0401.pdf> (describing the forms of physical abuse that exist in prisons).

¹³⁰ *Id.* at 29-30; JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 61 (2003); Anthony E. Bottoms, *Interpersonal Violence and Social Order in Prisons*, 26 *CRIME & JUST.* 205, 205-07, 268-72 (1999).

¹³¹ MARILYN D. MC SHANE AND FRANK P. WILLIAMS III, EDS., *ENCYCLOPEDIA OF AMERICAN PRISONS* 379 (New York: Garland Publishing, Inc., 1996).

¹³² Robert W. Dumond, *Symposium: The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-39 The Prison Rape Elimination Act of 2003*, 32 *J. LEGIS.* 142, 142-43, 146-47 (2006); Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* 10 (2001), available at <http://files.findlaw.com/news.findlaw.com/cnn/docs/hrw/hrwmalerape0401.pdf>.

¹³³ One study of seven men’s prisons in four Midwestern states found that 21 percent of prisoners had been forced to have sexual contact against their will. Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Facilities for Men*, 80 *PRISON J.* 379, 382-83 (2000).

¹³⁴ Nilsen, *supra* note __, at 125-126.

¹³⁵ *See, e.g., Sandin v. Conner*, 515 U.S. 472, 482, 485 (1995) (The Court urges federal courts to become less involved in prison management and afford more “deference to state officials trying to manage a volatile environment.” Furthermore, the Court suggests that arbitrary corporal punishment of prisoners may be allowed because it is “within the expected parameters of the sentence imposed by a court of law.”); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (stating that “double-bunking” and the overcrowding of prisons is not cruel and unusual because “[t]o the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society”); *Bell v. Wolfish*, 441 U.S. 520, 561 (1979) (recommending a “hands-off” approach to prison administration in which courts defer to prison officials’ expertise).

¹³⁶ *Furman*, 408 U.S. at 288 (Brennan, J., concurring).

¹³⁷ *Id.* (quoting *People v. Anderson*, 6 Cal. 3d 628, 649 (1972)).

case-by-case basis in other prisons.¹³⁸ Studies show that individuals placed in solitary confinement begin developing abnormal brain activity on electroencephalograms (EEGs) “characteristic of stupor or delirium” within just a few days.¹³⁹ Prolonged confinement leads to other deleterious effects, ranging from the exacerbation of preexisting mental conditions to the loss of impulse control, panic attacks, hallucinations, paranoia, and hypersensitivity to external stimuli.¹⁴⁰ When these individuals are released from their solitary confinement, they are “utterly dysfunctional.”¹⁴¹

The psychic pain associated with incarceration is not limited to the relatively few prisoners serving their sentences in isolation. Mere overcrowding “may produce physiological and psychological stress among many inmates.¹⁴² Life sentences without parole – the fate of approximately 40,000 inmates¹⁴³ – cause mental trauma as well. Indeed, some individuals with death sentences have waived their appeals because of their view that a life sentence without parole would be worse.¹⁴⁴ They preferred capital punishment to the “slow death” of prison.¹⁴⁵ John Stuart Mill eloquently wrote of the suffering associated with a life sentence as subjecting defendants to “a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards – debarred from all pleasant sights and sounds, and cut off from all earthly hope...”¹⁴⁶ The German Constitutional Court has concluded that life without parole “infringes upon the inmate’s dignity as a person because it condemns her to a life without meaning and denies her fundamental human potential to make a positive contribution to society.”¹⁴⁷ If mental pain justifies heightened regulation in death cases, the

¹³⁸ Nilsen, *supra* note __, at 128 (noting that there are now over 40 supermax facilities holding 2% of state and federal prisoners and in most cases this means these prisoners are confined to their cells without human interaction for 23 hours a day).

¹³⁹ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 328-338 (2006).

¹⁴⁰ *Id.*

¹⁴¹ Nilsen, *supra* note __, at 129.

¹⁴² James Bonta & Paul Gendreau, *Reexamining the Cruel and Unusual Punishment of Prison Life*, 14 LAW & HUM. BEHAV. 347, 355 (1990).

¹⁴³ Nilsen, *supra* note __, at 119 (noting that 28% of the 132,000 prisoners serving life sentences have no chance of parole).

¹⁴⁴ Logan, *supra* note __, at 712 n. 143 (citing cases where inmates preferred death sentence to life in prison). *See also* Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 855-861 (1987).

¹⁴⁵ Logan, *supra* note __, at 712.

¹⁴⁶ Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 712 (1998).

¹⁴⁷ Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 714(1995).

significant psychological pain associated with incarceration would seem to merit similar oversight.¹⁴⁸

The severity of death transcends the simplistic concept of pain, however. There is, as Justice Brennan notes, the sheer “enormity” of death.¹⁴⁹ “Death is truly an awesome punishment” that “involves, by its very nature, a denial of the executed person’s humanity.”¹⁵⁰ Nothing can compare to the end of one’s life, so nothing the state does is a greater intrusion on autonomy and liberty. To treat death differently on this basis is to rely on the argument that, because death is the most extreme punishment in the state’s arsenal, it is more important to get these sentences right than others. In *Lockett*, the Court made this very point, arguing that “[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.”¹⁵¹ Death is “far more important” because of its enormity, because of its consequence.

But just because it is *more* important to recognize robust Eighth Amendment rights in capital cases does not answer whether those same rights are also relevant to noncapital cases. The First Amendment may be “far more important” in the context of political speech than pornography, but that does not mean that the former gets protection and the other receives none. The right to equal protection may be “far more important” in the context of protecting the right to attend school than in governing how prisoners are allocated to cells, but that does not mean that one gets protection and the other does not. The right to a *Miranda* warning might be “far more important” for defendants facing capital charges than those facing a fine, but everyone in custody has the same right to the information in the warning. In all these contexts, the Court has recognized that, just because a constitutional protection provides the greatest utility in one context, that does not mean that it does not have value elsewhere. Indeed, in no other area of the Court’s constitutional jurisprudence does the Court reserve a right for the subgroup that it deems most deserving and then leave everyone else without the same constitutional protection. Once the Court recognizes a constitutional right, it applies to all, not just to those who might need it the most.¹⁵²

¹⁴⁸ See Nilsen, *supra* note __, at 153 (“Each sentence contains particular hardships, pain, and loss, thus each should be subject to meaningful Eight Amendment scrutiny considering both circumstances of the offender and the crime.”).

¹⁴⁹ *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring).

¹⁵⁰ *Furman*, 408 U.S. at 290 (Brennan, J., concurring). Justice Brennan further notes that, unlike a term of imprisonment, where an individual “does not lose ‘the right to have rights,’” the capital defendant loses all rights and ceased to be “a member of the human family.” *Id.* See also Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 119 (2004) (a death sentence involves the “total denial of the humanity of the convict”).

¹⁵¹ *Lockett*, 438 US at 605.

¹⁵² As Erwin Chemerinsky has noted:

To be sure, the Court has adopted some de minimis thresholds before a right will be triggered, but those floors are designed to rule out cases of little impact or importance. For example, the jury guarantee applies when a defendant faces a punishment greater than six months. No one could argue that every sentence other than a capital sentence is de minimis. On the contrary, the six-month threshold for the jury guarantee demonstrates that most noncapital sentences are constitutionally significant. Indeed, for Eighth Amendment purposes, even one day in jail could be cruel and unusual, as the Court stated in *Robinson*. The principles of avoiding arbitrary punishment, ensuring individualization, and preventing disproportionate punishment do not lend themselves to a de minimis exception – and certainly not one that includes every sentence other than a death sentence. If these rights exist at all, they should apply to all defendants, not just a select few identified by the Court.

This is how rights operate under a Constitution that is commitment to equal protection under the law. As Justice Jackson observed, “[c]ourts can take no better measure to assure that laws will be just than to require that laws be equal in operation.”¹⁵³ While the Court has adopted different levels of scrutiny as part of its equal protection analysis to determine when a right can be trumped, this framework never disavows the fundamental principle that everyone possesses the right to equal treatment in the first place. To put the point slightly differently, while the Court might conclude that the right to free speech must yield in the face of a competing state interest, the Court has never said that First Amendment rights extend only to some subset of the population. Instead, the Court follows a framework that acknowledges that the right broadly applies unless there is a sufficiently strong government interest to override that right – a balancing test that the Court must openly conduct as part of its decision.¹⁵⁴ Insisting on an opinion with this kind of explanation is not a mere

“[A] general approach that says death is different doesn’t make sense under the Constitution. Surely the Fourth Amendment rules with regard to search and seizure aren’t going to be applied differently in capital cases than noncapital cases. The Fifth Amendment rights to grand jury indictment or the privilege against self-incrimination aren’t going to apply differently in death penalty than in nondeath penalty cases.”

Chemerinsky, *supra* note ___, at 220.

¹⁵³ *Railway Express Agency v. New York*, 336 U.S. 106, 113 (1949). Cf. Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right To Vote*, 49 *How. L.J.* 741, 762 (2006) (pointing out that future voting reforms should account for the voting rights of all Americans, and not just the subset who face racial discrimination). The Court’s preferential treatment of capital defendants is akin to special legislation, which is broadly disfavored. Like special legislation, the Court’s death-is-different jurisprudence monopolizes the Court’s attention to such an extent that the Court has neither the energy nor the will to address the larger, more general needs of all criminal defendants. Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 *AM. J. LEGAL HIST.* 271, 279 (2004) (“To its detractors special legislation so monopolized the business of the state legislatures that they lacked the time or the attention to enact general laws increasingly needed to address the problems of states as a whole.”).

¹⁵⁴ The balancing test from *Mathews v. Eldredge*, 424 U.S. 319 (1976), that the Court uses to determine what process is necessary before a right can be stripped away from an individual follows this same model. First, the Court determines whether there is an interest in life, liberty, or property – and the deprivation of liberty associated with incarceration satisfies this part of the

formality. It is a critical check that disciplines the Court, for the Court must use reason, not *ipse dixit*, to justify the deprivation of a right.

The Court's bifurcated approach to sentencing stands alone in the law in its rejection of these principles, for it is only in this context that the Court uses a variant of the balancing test to determine who is entitled to the right in the first place. The consequence is that the Court never needs to explain why some government interest trumps a noncapital defendant's right to individualized consideration or allows a defendant to be punished arbitrarily – an opinion that would, to say the least, not be easy to write. There is therefore no opportunity to scrutinize the Court's reasons for trumping these rights in given circumstances, and a critical check on judicial power is lost.

The severity of a death sentence cannot justify this departure from basic constitutional principles. Indeed, nothing can, for it flies in the face of what it means to follow the rule of law. To say that some protections are more important for capital defendants than for noncapital defendants because of the enormity of death may be true, but that fact does not lead to the conclusion that noncapital defendants are not entitled to the same protections. In all other contexts, the Court would require the government to allege an interest that is sufficiently great to override the individual's interest in the right. Elected officials could not allege simply that “death is different” to justify deprivation of the right for all other defendants. They would have to point to government interests that override the right.

With severity as insufficient to justify the Court's two-track approach to sentencing, some other explanation must fill the void. Justice Stewart provided one such additional rationale for treating death differently. He argued in *Furman* that death is “unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.”¹⁵⁵ But while the rejection of rehabilitation as a purpose of criminal punishment may have seemed unique to the death penalty in 1972 when Justice Stewart wrote, it is hardly unique now. After Robert Martinson published a widely-read paper in 1974 questioning that utility of rehabilitative programs,¹⁵⁶ jurisdictions took notice and began to doubt the efficacy of pursuing rehabilitation as a goal of criminal punishment. The federal sentencing scheme explicitly forbids imposing a term of incarceration on the view that it will lead to rehabilitation,¹⁵⁷ and other jurisdictions likewise

test. Second, the Court moves to a balancing test to decide what process is due the individual before this right can be taken away.

¹⁵⁵ *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

¹⁵⁶ Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB INTEREST 22 (1974).

¹⁵⁷ 28 U.S.C. § 994(k) (“The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”).

reject rehabilitation as the goal of their penal sanctions.¹⁵⁸ In an age when rehabilitation has been broadly rejected for all punishments, death cannot be treated differently on that basis.

That leaves the finality of death as the remaining basis for the Court's special jurisprudence. The Court has emphasized this aspect of death in several of its opinions.¹⁵⁹ In *Woodson*, the Court noted that "[d]eath, in its finality, differs more from life imprisonment than a 100-year term differs from one of only a year or two,"¹⁶⁰ and used this distinction to strike mandatory death sentences. In *Lockett*, the Court emphasized the finality of death when it distinguished noncapital cases, positing that in noncapital cases, other mechanisms such as probation, parole or furloughs could modify an initial sentence of confinement, whereas an executed death sentence could not be fixed.¹⁶¹

The problem with the Court's reliance on finality is twofold. First, the Court has never held that there is a constitutional requirement that a jurisdiction provide any of the corrective mechanisms the Court emphasized in *Lockett* for noncapital cases, and, in fact, many jurisdictions do not. A host of states and the federal government have abandoned parole and/or drastically limited probation and furloughs. In all of these jurisdictions, these safety valves are lacking. Noncapital defendants, like capital defendants, must rest their hopes in executive clemency. So, for purposes of error correction after a sentence has been imposed, there may be no difference between a capital and noncapital sentence because correctives may be absent in noncapital cases as well.

Second, even where safety valves exist, they offer no compensation for the time an individual has already spent in prison. If the Court were to compare an execution that has been carried out to time served – which is the relevant comparison because the issue is what recompense is available if a mistake has been made in the initial sentence such that the punishment is disproportionate, arbitrary, or inattentive to individual circumstances – both situations would be irrevocable and lack correctives.¹⁶² The only effective check on excessive

¹⁵⁸ David E. Johnson, Note, *Justice for All: Analyzing Blakely Retroactivity and Ensuring Just Sentences in Pre-Blakely Convictions*, 66 OHIO ST. L.J. 875, 880, note 27 (2005) (describing states that have rejected the rehabilitation model of sentencing).

¹⁵⁹ Justice Stewart's oft-cited opening paragraph to his concurrence in *Furman* began by highlighting death's "total irrevocability." *Furman*, 408 U.S. at 306 (Stewart, J., concurring). Justice Brennan's *Furman* concurrence also noted that death's "finality" is one of the manifestations of its severity. *Furman*, 408 U.S. at 289 (Brennan, J., concurring). The dissenters in *Solem* characterized the capital proportionality cases as "rest[ing] on the finality of the death sentence." *Solem*, 463 U.S. at 313 (Burger, J., dissenting).

¹⁶⁰ *Woodson*, 428 U.S. at 305.

¹⁶¹ *Lockett*, 438 U.S. at 605.

¹⁶² "There is no way to recover any portion of a sentence, be it a death sentence or a term of years, once it has already been served." Note, *Rhetoric of Difference*, *supra* note ___, at 1620.

sentences of either type comes from getting the sentence right in the first instance.¹⁶³

It is in that sense that the language of “finality” is misleading. When the Court discusses its concern with the finality of a death sentence, it is focusing on its irreversibility.¹⁶⁴ But a sentence of life imprisonment is also irreversible once it has been served, as is any term of years in prison that the defendant has endured. Those years cannot be brought back.

The Court’s real concern is not that the *sentence* of death is irreversible, because noncapital sentences are similarly irreversible. What is irreversible with a death sentence is one’s entire life, whereas what is irreversible with noncapital sentences are the lost years of incarceration, a portion of an individual’s life. The Court is more concerned with the irreversible loss of an entire life. But the fact that something greater – indeed, far greater – is irreversibly lost in the context of a death sentence is just another way of saying that it is the severity of a death sentence that worries the Court. As noted above, this focus on death as a more extreme punishment says nothing about whether other sentences are sufficiently serious that they merit the same protections in the absence of a compelling government argument to the contrary. It is the Court’s complete failure to tackle that question and instead to rely solely on the *more* serious nature of a death sentence that creates the most gaping hole in its sentencing jurisprudence and distinguishes it from virtually all other areas of constitutional law.

The Court in many cases offers sound reasons for why protections are needed for capital defendants, but it offers no reason at all for why the same protections are not also mandated in noncapital cases. To say that capital punishment must “be imposed fairly, and with reasonable consistency, or not at all,”¹⁶⁵ but then to allow the opposite in noncapital cases – that is, to allow punishment to be imposed unfairly and inconsistently – is to create a jurisprudence wholly lacking in constitutional support.

C. *Are There Distinctions Applicable to Specific Substantive Contexts?*

Although the Court fails in making a case for treating death differently on the basis of severity or finality, are there nevertheless specific arguments that justify some or all of particular rules adopted by the Court? This section takes up the task of considering whether the logic employed by the Court in any of these substantive areas applies uniquely to death.

¹⁶³ In insisting that a death penalty sentencing authority be permitted to consider mitigating factors, the Court also relied on the fact that “the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty.” *Lockett v. Ohio*, 438 U.S. 586, 602 (1978) (plurality opinion). But that same history is true in capital and noncapital cases alike.

¹⁶⁴ *Woodson*, 428 U.S. at 323 (Rehnquist, J., dissenting) (“One of the principal reasons why death is different is because it is irreversible.”); *Furman*, 408 U.S. at 306 (Stewart, J., concurring) (noting death is “unique in its total irrevocability”); *id.* at 306 (Brennan, J., concurring) (distinguishing noncapital cases because the “punishment is not irrevocable”).

¹⁶⁵ *Eddings*, 455 U.S. at 112.

1. *Guided Discretion.* — When five Justices agreed in *Furman* that the death penalty statutes under review were unconstitutional, they could not claim their resistance was based on contemporary standards. By 1963, every state had discretionary jury sentencing in death penalty cases for almost every death-eligible crime.¹⁶⁶ Instead, the Court's concern rested on a concern that this discretion, even if broadly adopted, resulted in arbitrary and capricious decisionmaking.

But why is arbitrary and capricious decisionmaking the exclusive concern of capital punishment? Arbitrary and capricious decisionmaking is equally possible in noncapital cases that similarly vest broad discretionary authority with a judge or jury.¹⁶⁷ Indeed, at least five Justices in *Furman* acknowledged the logical conclusion that selective application of a punishment would be no less troublesome in a noncapital case than in a capital case. Justice Douglas noted that “it is ‘cruel and unusual to apply the death penalty – or any other penalty – selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.’”¹⁶⁸ Four dissenting Justices in *Furman* likewise agreed that, “[i]f discriminatory impact renders capital punishment cruel and unusual, it likewise renders invalid most of the prescribed penalties for crimes of violence.”¹⁶⁹ These Justices therefore recognized that, in this respect, death is not different. If laws giving the sentencer wide discretion are being applied to the disadvantage of the underprivileged, that should be no less of a constitutional concern in noncapital cases than it is capital cases. And, of course, the reality is that discretion in criminal justice has typically meant that people of color and the underprivileged get the worst the system has to offer.¹⁷⁰

Indeed, the argument for policing arbitrary sentencing in noncapital cases might be even stronger if contemporary standards are taken into account. There is an evolving consensus among the states that it is necessary to guide the

¹⁶⁶ *Woodson*, 428 U.S. at 291-92 and n.24.

¹⁶⁷ See Stephen A. Salzberg, *Due Process, History, and Apprendi v. New Jersey*, 38 AM. CRIM. L. REV. 243, 243-247 (2001) (describing the broad discretion in indeterminate sentencing jurisdictions as “an arbitrary (and often capricious) process”).

¹⁶⁸ *Furman*, 408 U.S. at 245 (Douglas, J., concurring) (emphasis added).

¹⁶⁹ *Id.* at 447 (Powell, J., dissenting).

¹⁷⁰ Nilsen, *supra* note __, at 121 (noting that nearly one in eight black men between the ages of 20 and 29 are in prison, compared to one in 59 white men in that age group and that “[t]hese rates are quite disproportionate to the commission of crimes within each group”); TUSHAR KANSAL, THE SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE (2005) (reviewing studies that reveal pervasive racial bias in sentencing), available at http://www.sentencingproject.org/Admin/Documents/publications/rd_sentencing_review.pdf; Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in 3 NAT'L INST. OF JUSTICE, CRIMINAL JUSTICE 2000 427, 428 (“[S]tudies suggest that race and ethnicity do play an important role in contemporary sentencing decisions.”), available at http://www.ncjrs.org/criminal_justice2000/vol_3/03i.pdf.

discretion of those who sentence, whether it be judges or juries. More than one-third of the states now have some form of sentencing guidelines to avoid arbitrary and capricious sentencing by judges, and others are getting ready to follow suit.¹⁷¹ Even in states without sentencing guidelines, there has been a shift to mandatory punishments in an effort to eliminate sentencing discretion. Why these mandatory sentences can be criticized for creating their own arbitrary results, their proliferation evinces the broad support among the public for cabining sentencing discretion.

2. *Individualization.* — The Court’s competing concern with discretion – that the sentencing authority must be able to consider mitigating evidence about the offense and offender – is likewise just as applicable in noncapital cases as in capital cases. When the Court rejected individualized sentencing for noncapital cases in *Harmelin*, the Court relied on the fact that severe and mandatory penalties had been employed throughout the Nation’s history.¹⁷² But that was also true of the death penalty; for most of its history, it was a mandatory sentence. And when states shifted to discretionary sentencing for capital cases as the dominant approach, they also adopted discretionary sentencing as the accepted approach in noncapital cases.¹⁷³ In capital and noncapital cases alike, “[t]he belief no longer prevail[ed] that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.”¹⁷⁴ Mandatory sentencing reemerged for capital cases in the mid-1970s after *Furman*, with ten states opting for mandatory capital punishment,¹⁷⁵ and for noncapital cases in the late 1970s and early ‘80s.¹⁷⁶ The historical trends in both contexts, then, are largely the same.¹⁷⁷

¹⁷¹ Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1191 (2005).

¹⁷² *Harmelin*, 501 U.S. at 994-95.

¹⁷³ Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1949-2007 (1995) (recounting the growth of individualized criminal justice during the Progressive Era); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1778 (1999) (describing the origins of indeterminate sentencing).

¹⁷⁴ *Williams v. New York*, 337 U.S. 241, 247 (1949).

¹⁷⁵ *Woodson*, 428 U.S. at 313 (Rehnquist, J., dissenting).

¹⁷⁶ Lanni, *supra* note 144, at 1779 n.14 (“By 1983, 49 states had adopted mandatory sentencing laws, primarily for drug and violent offenses.” (citing MICHAEL H. TONRY, SENTENCING REFORM IMPACTS 25 (1987)); *Harris v. United States*, 536 U.S. 545, 558 (2002) (noting the trend toward mandatory sentencing in the latter part of the 20th century); *id.* at 570 (Breyer, J., concurring in part and concurring in the judgment) (observing that “mandatory minimum sentencing statutes have proliferated in number and importance” in the past two decades); *id.* at 581 n.5 (Thomas, J., dissenting) (“Mandatory minimum sentence schemes are themselves phenomena of fairly recent vintage genesis.”).

¹⁷⁷ The Court in *Woodson* relied on juries’ resistance to convict in cases with a mandatory death penalty as evidence of a changing contemporary standard. Although it is impossible to obtain the same information about noncapital cases because courts have not allowed juries to be told that the case involves a mandatory sentence, *see supra* TAN __-__, when juries are aware of the punishment in noncapital cases, they also resist mandatory sentences. Rachel E. Barkow,

Aside from this misleading reference to the history of mandatory sentences for noncapital crimes, the Court in *Harmelin* gave no explanation for its failure to apply *Woodson* to noncapital cases except a cursory reference to the “qualitative difference” of death.¹⁷⁸ But the concerns the Court expressed about mandatory sentences in *Woodson* are not limited to capital punishment. The Court in *Woodson* rejected mandatory capital statutes because they “treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass....”¹⁷⁹ The Court believed that “the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting death.”¹⁸⁰ It then reiterated in *Lockett* that it was “satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”¹⁸¹ Because the death penalty is “so profoundly different from all other penalties,” the Court stated it could not “avoid the conclusion that an individualized decision is essential in capital cases.”¹⁸²

On what basis does the “fundamental respect for humanity underlying the Eighth Amendment” not apply to a situation in which an individual is locked in a cell? Surely in that situation as well the sentencer must consider the character and record of the accused to ensure that the punishment fits the circumstances. Why can defendants be treated as “a faceless, undifferentiated mass” when they receive a term of imprisonment? The Court does not even attempt to answer that question in *Woodson*, *Lockett*, *Harmelin* or any other case.

3. *Proportionality Review.* — As noted, the Court has found a death sentence to be “excessive” in a multitude of situations but it almost never strikes down a sentence outside the capital context. One reason for the difference in outcomes is the Court’s willingness in capital cases to consider objective evidence of contemporary values (*i.e.*, legislation and jury decisions) as well as its “own judgment” of whether a capital sentence is excessive.¹⁸³ Another is the Court’s general sense that “the Eighth Amendment applies to

Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing, 152 U. PA. L. REV. 33, 79-80 (2003). Thus, even though the evidence is incomplete, there is some reason to think that juries would resist mandatory sentences in many noncapital cases as well.

¹⁷⁸ *Harmelin*, 501 U.S. at 995.

¹⁷⁹ *Woodson*, 428 U.S. at 304.

¹⁸⁰ *Woodson*, 428 U.S. at 304.

¹⁸¹ *Lockett*, 438 U.S. at 604.

¹⁸² *Lockett*, 438 US at 605.

¹⁸³ *Coker*, 433 U.S. at 597 (“[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”); *Enmund*, at 797 (“[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty.”).

[the death penalty] with special force.”¹⁸⁴ The Court is of the view that “[b]ecause a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance” in noncapital cases.”¹⁸⁵

There is nothing in the Constitution’s text or history that supports employing two different tests for excessiveness or applying the Eighth Amendment with “special force” in some cases and not others.¹⁸⁶ As the dissenting opinion in *Harmelin* pointed out, proportionality review in capital cases is part of the Eighth Amendment’s prohibition on cruel and unusual punishments, and the Court has offered no explanation for why the words “‘cruel and unusual’ include a proportionality requirement in some cases but not in others.”¹⁸⁷ Nor do the “evolving standards of decency that mark the progress of a maturing society,”¹⁸⁸ support differential treatment. On the contrary, evolving standards of decency suggest that both capital and noncapital sentences alike can become cruel and unusual.¹⁸⁹

To be sure, because death is the most severe punishment administered by the state, it is understandable that the Court would require that it be reserved for the most serious offenses.¹⁹⁰ This, in turn, may make it easier for the Court to create categorical rules for capital cases that exempt offenses. But that conclusion does not mean that every other punishment should thereby get a free pass. Other punishments can also be excessive for the offense. As Youngjae Lee has argued, “the lazy slogan that ‘death is different’ hardly amounts to a

¹⁸⁴ *Roper*, 543 U.S. at 568. *See also id.* at 589 (O’Connor, J., dissenting) (agreeing that the principle of proportionality “applies with special force to the death penalty”).

¹⁸⁵ *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

¹⁸⁶ There is, as Justice Powell has written, “no support in the history of Eighth Amendment jurisprudence” for the notion that the principle of proportionality is less applicable in noncapital sentences. *Rummel*, 445 U.S. at 288. *See also id.* at 288-89 (noting the long tradition of ensuring that punishments were not excessive in length); *Solem*, 463 U.S. at 284 (noting that “[t]he principle that a punishment should be proportionate to the crime is deeply rooted” and that “[w]hen prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional”); *id.* at 288 (“There is no basis for the State’s assertion that the general principle of proportionality does not apply to federal prison sentences.”).

¹⁸⁷ *Harmelin*, 501 U.S. at 1014 (White, dissenting).

¹⁸⁸ *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958 (plurality opinion)).

¹⁸⁹ *See, e.g., Rummel v. Estelle*, 445 U.S. at 296 (Powell, J., dissenting) (noting the lack of comparable habitual offender statutes to the one at issue in all but three states); *Ewing v. California*, 538 U.S. at 47, 53-62 (Breyer, J., dissenting) (noting that the lack of comparable three-strikes laws to the one at issue in California).

¹⁹⁰ *Id.* (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”).

principled distinction or a satisfactory explanation of the particular differences between the two kinds of cases.”¹⁹¹

The Court’s decisions disallowing the death penalty for certain offenders because they are less culpable are also not limited by their logic to defendants facing capital punishment. Consider the Court’s arguments for exempting juveniles from the death penalty. The Court highlighted in *Roper* that juveniles’ “comparative immaturity and irresponsibility,” their susceptibility to peer pressure, and the fact that their character is “not as well formed as that of an adult” exempt them from being among the worst offenders.¹⁹² The Court further noted that “[t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”¹⁹³ There is, according to the Court, “a greater possibility . . . that a minor’s character deficiencies will be reformed.”¹⁹⁴ If all that is true, how can juveniles receive life without parole, the punishment for the worst offenders in all noncapital states and the most common punishment for the worst offenders even in states with capital punishment?¹⁹⁵ For that matter, how can any punishment apply equally to juvenile and adult offenders without some assessment that the juvenile possesses the requisite maturity of judgment that

¹⁹¹ Lee, *supra* note ___, at 697. See also Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 452 (2004) (“[T]here is no logical, moral, or constitutional basis for confining the requirement of blameworthiness and the principle of proportionality to capital punishment law.”).

¹⁹² *Roper*, 543 U.S. at 569-570.

¹⁹³ *Id.* at 570.

¹⁹⁴ *Id.*

¹⁹⁵ To the extent the Court relied on international norms in striking down the death penalty for juveniles, it is worth noting that the United Nations Convention on the Rights of the Child forbids life without parole for individuals under 18. Convention on the Rights of the Child, art. 37(a) Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989). All member nation states have ratified the CRC except for the United States and Somalia. Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005) at 99 (hereinafter “*The Rest of Their Lives*”), <http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>. In addition, the International Covenant on Civil and Political Rights (ICCPR) mandates special protections for juveniles, including a mandate that “[j]uvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status” and that criminal procedures “take account of their age and the desirability of promoting their rehabilitation.” International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); 6 I.L.M. 368 (1967), Articles 10(3) and 14(4). The United States ratified the ICCPR in 1992, but it added a reservation clarifying that “the United States reserves the right, *in exceptional circumstances*, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.” *The Rest of Their Lives*, *supra* at 97, citing United Nations Treaty Collection, International Covenant on Civil and Political Rights, United States of America: Reservations, ¶ 5. The United States is one of only thirteen countries in the world that authorizes a sentence of life without parole for juveniles, and one of only four countries with juveniles currently such a sentence. Adam Liptak, *No Way Out: The Youngest Lifers Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A2. In the other three countries, there are seven or fewer juveniles serving such a sentence; in the United States, there are more than 2200. *Id.* See also *The Rest of Their Lives* at 104-07.

merits giving him the same sentence as an adult?¹⁹⁶ As Franklin Zimring has noted, “[d]iminished responsibility is either generally applicable or generally unpersuasive as a mitigating principle.”¹⁹⁷ Even before the Court categorically exempted juveniles from the death penalty, it required youth to be treated as a mitigating factor in capital cases because adolescents are less mature and responsible.¹⁹⁸ The Court has offered no explanation for why the diminished responsibility of juveniles is confined to death penalty cases. If adolescents may not be responsible enough to get a death sentence, they may not be responsible enough to get the same term of confinement as an adult.¹⁹⁹

The Court’s arguments about the lesser culpability of the mentally retarded are similarly more expansive than the context of capital cases. The Court stated that, “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses . . . [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”²⁰⁰ While that does not mean that the mentally retarded should be exempt from all criminal punishment, it does follow that mental retardation diminishes personal culpability. As a result, laws that impose mandatory punishments without allowing the sentencer to consider the offender’s mental retardation seem to run afoul of the Court’s logic in *Atkins*. Even the dissent in *Atkins* seemed to acknowledge the legitimacy of having the sentencer take into account a defendant’s retardation in assigning blame for a crime.²⁰¹ The majority in *Atkins* recognized a “special risk of wrongful execution” of the mentally retarded, but as the dissent points out, that argument “might support a due process claim in all criminal prosecutions of the mentally retarded.”²⁰²

The logic of the Court’s arguments about the need to take a look at the particular facts of a case involving felony murder similarly likewise applies beyond capital cases to noncapital ones as well. In its decision in *Enmund* limiting the death penalty for felony murder to those who kill or intend that a

¹⁹⁶ Some states require automatic transfer of a juvenile to the adult system when they are charged with certain crimes, without an individual assessment of the juvenile. See, e.g., Ala. Code § 12-15-34 (2008); Conn. Gen. Stat. § 46b-127 (West 2008); Ga. Code Ann. § 15-11-28(b)(2)(A) (2008); 705 Ill. Comp. Stat. Ann. 405/5-130 (West 2006); N.C. Gen. Stat. § 7B-2200 (2008); Ohio Rev. Code Ann. § 2152.12 (LexisNexis 2008); Juvenile Act, 42 Pa. Cons. Stat. Ann. §6302 (2004); W. Va. Code Ann. § 49-5-10 (West 2008).

¹⁹⁷ FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 84 (1998).

¹⁹⁸ *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

¹⁹⁹ For thoughtful arguments on the potential disproportionality of adult prison sentences for juveniles, see Logan, *supra* note __, at 709-725; Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 542-545 (2003).

²⁰⁰ *Atkins*, 536 U.S. at 306.

²⁰¹ *Id.* at 351 (“only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question”).

²⁰² *Id.* at 352 (Scalia, J., dissenting).

death result, the Court stated that “[i]t is fundamental that ‘causing harm intentionally must be punished more severely than causing harm unintentionally.’”²⁰³ The Court further stated that, because death occurs so infrequently in the course of felonies, sentencing all participants in a felony that results in death as if they committed murder fails to act as an effective deterrent.²⁰⁴ These concerns cannot be limited to a case where death is the punishment.²⁰⁵ If causing harm intentionally must lead to more severe punishment than causing harm unintentionally, how can a jurisdiction treat all participants in a felony murder case equally if some of them acted unintentionally? And if sentencing all participants equivalently is a poor deterrent because deaths rarely result from felonies in any event, that argument applies in capital and noncapital cases alike.

It is by judicial proclamation alone that the Court requires sentencers to consider the “characteristics of the crime and the characteristics of the offender”²⁰⁶ in every death penalty case but imposes no such requirement in every other criminal case.

D. Administrative Concerns

Although the Court has most frequently rested its bifurcated jurisprudence of sentencing in substantive terms, emphasizing the finality and severity and death, administrability concerns are clearly a factor in the Court’s two-track approach to sentencing.

When the Court has resisted importing death penalty standards to noncapital cases, it has frequently alluded to administrative problems, particularly in its proportionality jurisprudence.²⁰⁷ Death is the most serious punishment, so the Court can categorically exempt certain crimes from its purview as not being the most serious crimes. In contrast, every other

²⁰³ *Enmund*, 458 U.S. at 798 (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).

²⁰⁴ *Id.* at 799 (citing Model Penal Code §210.2, Comment p. 38 and n. 96).

²⁰⁵ Indeed, the criticism contained in the Model Penal Code commentary on which the Court relied in *Enmund* applies to all felony murder cases, not just capital ones. See Model Penal Code §210.2, Comment p. 38-39 (noting that “it remains indefensible in principle to use sanctions that the law employs to deal with murder unless there is at least a finding that the actor’s conduct manifested an extreme indifference to the value of human life”).

²⁰⁶ *Id.* at 572.

²⁰⁷ *Rummel*, 445 U.S. at 275-76 (rejecting a challenge to a noncapital sentence and noting that “the lines to be drawn are indeed ‘subjective,’ and therefore properly within the province of legislatures, not courts”); *id.* at 280 (“It is one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. It is quite another thing for a court to attempt to evaluate the position of any particular recidivist scheme within Rummel’s complex matrix.”); *Ewing*, 538 U.S. at 31 (Scalia, J., concurring in the judgment) (arguing that proportionality is not administrable because it amounts to an “evaluation of policy”); *Solem*, 463 U.S. at 315 (Burger, J., dissenting) (worrying that the majority’s opinion “will flood the appellate courts with cases in which equally arbitrary lines must be drawn”); *Harmelin*, 501 U.S. at 988 (Scalia, J., joined by Chief Justice Rehnquist) (lamenting that noncapital offenses cannot be compared because “there is no objective standard of gravity”).

punishment is on a sliding scale, and thus it is more difficult to calibrate when a given term of confinement is too much. As a result, the Court has resisted extending protections to noncapital cases because of a concern with judicial management. To give the Court its due, it is harder to draw distinctions with terms of confinement than with capital punishment.

But as with its other rationales, the Court's arguments based on ease of administration fall short as a basis for treating death categorically different and for refusing to scrutinize noncapital sentences at all. Just because it would be more difficult to police noncapital sentences to ensure they are not cruel and unusual does not mean that it is impossible. On the contrary, there is ample evidence that the Court is more than capable of this task.

Most directly on point, the Court has already engaged in a form of proportionality analysis outside the capital context. Even under the Court's current, weak proportionality test, it must compare the gravity of the offense with the harshness of the penalty to decide whether the state has a "reasonable basis for believing" that it will serve either deterrent, retributive, rehabilitative, or incapacitation goals.²⁰⁸ Including *Solem's* remaining two factors as part of the inquiry – as opposed to factors that come into play only after the first factor is used as a threshold – would make the Court's approach more objective, not less.²⁰⁹ Those two factors would require courts to "compare the sentences imposed on other criminals in the same jurisdiction" and "the sentences imposed for commission of the same crime in other jurisdictions."²¹⁰ These comparisons, as the Court has repeatedly stated in death penalty cases, are objective considerations.²¹¹ And although they require judgment calls, the Court has already recognized certain basic rules of thumb – for example, that violent crimes are more serious than nonviolent ones, that intentional conduct is more serious than negligent conduct, that lesser included offenses should not be punished more seriously than the greater offense.²¹² There is, moreover, social

²⁰⁸ *Solem*, 463 U.S. at 290-91.

²⁰⁹ Although Justice Scalia has argued that the second factor in *Solem* (comparing sentences within a jurisdiction) is not objective because judges have different notions of gravity, even he concedes that the third factor "can be applied with clarity and ease." *Harmelin*, 501 U.S. at 988-89 (Scalia, J., joined by Chief Justice Rehnquist). He disputes its relevance because of his view that states are free to differ from one another, but he fails to distinguish the use of this same factor in capital cases. *See id.* at 994 (stating only that "[p]roportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides" and concluding without explanation that "[w]e would leave it there, but will not extend it further"); *id.* at 1014 (White, J., dissenting) (noting that the logic of Justice Scalia's view that the Eighth Amendment is limited to modes of punishment and not their severity would mean that capital punishment would either be barred or accepted but it would not embrace the Court's approach of looking to see whether death is appropriate in some cases but not others).

²¹⁰ *Id.* at 291.

²¹¹ *Kennedy v. Louisiana*, slip op. at 11; *Atkins*, 536 U.S. at 312; *Roper*, 543 U.S. at 564.

²¹² *Solem*, 463 U.S. at 292-93.

science evidence that shows widely shared agreement on the relative seriousness of crimes.²¹³

Other courts have also demonstrated that proportionality could be taken seriously in noncapital cases. Lower federal courts have at various points used a more robust proportionality standard than the one ultimately adopted by the Court. For example, in the period before *Rummel* was decided, the Fourth Circuit employed a more robust proportionality review without difficulty.²¹⁴ Similarly, after *Solem* was decided, there was no evidence that courts were overwhelmed applying its three-part framework or that they interfered excessively with state sentencing judgments.²¹⁵ In the wake of the Supreme Court's transformation of the federal Sentencing Guidelines from mandatory to advisory,²¹⁶ federal courts are now charged with determining whether a sentence outside the guidelines is reasonable – an inquiry not unlike proportionality and one that the courts have been able to conduct.²¹⁷

State courts have also shown that proportionality review in noncapital cases is hardly inconsistent with the role of a judge. Many states have a proportionality requirement spelled out expressly in their constitutions.²¹⁸ Others have adopted a proportionality requirement in the course of interpreting a clause in the state constitution that prevents cruel or unusual punishment.²¹⁹

²¹³ Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1846-92 (2007) (finding agreement on the relative seriousness of many crimes); JOHN BRAITHWAITE & PHILIP PETIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 178 (1990) (“There is quite an impressive consensus within and even between modern societies on which types of crimes deserve most punishment and which least.”).

²¹⁴ *Rummel*, 445 U.S. at 306 (Powell, J., dissenting) (noting that the Fourth Circuit's case law “constitutes impressive empirical evidence that the federal courts are capable of applying the Eighth Amendment to disproportionate capital sentences with a high degree of sensitivity to principles of federalism and state autonomy”).

²¹⁵ *Harmelin*, 501 U.S. at 1015 (White, J., dissenting) (observing that post-*Solem*, courts had “little difficulty applying the analysis to a given sentence” and that the test “resulted in a mere handful of sentences being declared unconstitutional”).

²¹⁶ *United States v. Booker*, 543 U.S. 220 (2005).

²¹⁷ *Gall v. United States*, 128 S.Ct. 586 (2007) (noting that trial courts need not follow the Guidelines and are charged with setting a sentence in compliance with 18 U.S.C. §3553(a), which among other things, requires that the sentence “reflect the seriousness of the offense”). Justices Scalia and Thomas's resistance to substantive review of federal trial judges' sentencing decisions mirrors their resistance to proportionality review under the Eighth Amendment in noncapital cases.

²¹⁸ See Ill. Const. art. I, § 11; Ga. Const., art. I, §§ 16, 21; Ind. Const. art. I, §§ 15-16; N.H. Const. Pt. 1, art. XVIII; Me. Const., art. I, § 9; Ohio Const., art. VIII, §§ 13, 14; Or. Const. art. 1, §16; R.I. Const. art. 1, §8; Vt. Const. ch. 2, §39; W. Va. Const. art. II, § 2.

²¹⁹ See, e.g., *People v. Lorentzen*, 194 N.W.2d 827 (Mich. 1972); *Colorado v. Gaskins*, 825 P.2d 30 (Colo. 1992). For a summary of the state constitutional requirements, see Peter Mathis Spett, *Confounding the Gradations of Iniquity: An Analysis of Eighth Amendment Jurisprudence Set Forth in Harmelin v. Michigan*, 24 COLUM. HUM. RTS. L. REV. 203, 228-231 and n.126 (1992/1993).

These states, too, have had no difficulty enforcing their constitutional guarantees.

Moreover, the Court itself engages in this kind of proportionality review when it assesses the constitutionality of fines and punitive damage awards.²²⁰ The Court has held that the Due Process Clause requires judges to engage in proportionality review to determine whether punitive damage awards are unconstitutional, and it conducts this inquiry on a case-by-case basis.²²¹ As Justice Stevens has observed, “[i]t ‘would be anomalous indeed’ to suggest that the Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment.”²²²

Making contextual/fact-based judgments is what judges do. Judges have to determine whether particular delays violate the defendant’s right to a speedy trial.²²³ They must look at the specific facts of a case to see if a constitutional error is, in the circumstances, harmless.²²⁴ Determinations of reasonable suspicion and probable cause under the Fourth Amendment are similarly fact-intensive,²²⁵ as are questions of the materiality of evidence for purposes of deciding if the government committed a Brady violation.²²⁶

If anything, gauging the appropriateness of a sentence is more squarely within a judge’s skill set because of the long tradition of judicial sentencing.²²⁷ This task is made even easier by the abundant information now available on actual sentences imposed through sentencing commissions and guidelines.²²⁸

²²⁰ *United States v. Bajakajian*, 524 U.S. 321, 334-36 (1998) (fines); *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (bail).

²²¹ *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996). *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Philip Morris USA v. Williams*, 128 S.Ct. 2907 (2008); Pam Karlan, 88 MINN. L. REV. 880 (2004).

²²² *Ewing*, 538 U.S. at 33 (Stevens, J., dissenting).

²²³ *Doggett v. United States*, 505 U.S. 647 (1992); *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

²²⁴ *See Chapman v. California*, 386 U.S. 18, 24-26 (1967).

²²⁵ As the Court has conceded, “[a]rticulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible” because they are “fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.” *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

²²⁶ *Kyles v. Whitley*, 514 U.S. 419 (1995).

²²⁷ *See Ewing*, 538 U.S. at 34 (Stevens, J., dissenting) (noting that judges traditionally had “uncabined discretion” to sentence within broad ranges that required them to employ a proportionality principle).

²²⁸ *See, e.g.*, U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2007) (providing data on federal sentencing decisions in 72,868 cases from fiscal year 2007), available at <http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm>; U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS (2004) (presenting sentencing data from a nationally representative sample of state courts in 300 counties), available at <http://www.ojp.usdoj.gov/bjs/abstract/fssc04.htm>.

The only administrability concern that remains, then, is the sheer quantity of cases that would present a colorable issue. But, again, that has not stopped the Court's Fourth Amendment jurisprudence from going forward or its review of punitive damage awards. An increased docket of cases is a fact of modern judicial life, not a sufficient justification for jettisoning the Constitution.

Although manageability concerns have featured most prominently in proportionality cases, applying a *Furman*-based inquiry of whether a given sentencing scheme creates too high a risk of arbitrary and capricious punishment raises the same kind of line-drawing concerns. But, like the proportionality inquiry, it is not beyond the ken of judges.²²⁹ And courts in this context would be aided by the fact that numerous states now have sentencing guidelines that show how laws could be written to decrease the risk of arbitrary imposition. And, of course, it would certainly be straightforward to reject mandatory punishments in noncapital cases, just as it has been in death cases.

All of the Court's substantive sentencing decisions from the capital context would be administrable if they applied to noncapital cases. The Court's failure to take a unified approach to sentencing cannot rest on this rationale, just as it cannot be based on the Constitution itself.

III. THE PITFALLS OF THE TWO-TRACK SYSTEM

The Court's separate treatment of death should be of concern to anyone who cares about consistent and even-handed enforcement of the Constitution; but it should also alarm those who care about substantive sentencing policy. The Court's approach has harmed both capital and noncapital defendants, and it has exacerbated the already irrational politics of sentencing, as this Part explains.

A. *How the Two-Track System Harms Capital Defendants*

Many commentators are of the view that the Court's two-track jurisprudence generally benefits capital defendants because those defendants get additional legal protections.²³⁰ Given that the Court's death-is-different jurisprudence works as a one-way ratchet that provides extra protection in

²²⁹ The Court could make this assessment with relative ease by looking at the sentences imposed by judges for the crime at issue. If the variation is too stark, the Court could insist on more guidance in the statute or in guidelines. While the conclusion might be difficult in light of policy concerns about deferring to legislative judgments, the analysis itself would be straightforward. And in all of the jurisdictions that have adopted some form of guidelines, whether voluntary or mandatory, there would likely be no *Furman* problem because compliance with the guidelines is quite high.

²³⁰ See, e.g., AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (Rev. Ed. 2003) Justin W. Curtis, Comment, *The Meaning of Life (or Limb): An Originalist Proposal for Double Jeopardy Reform*, 41 U. RICH. L. REV. 991, 1023 (2007) (arguing that "capital defendants rightfully enjoy procedural safeguards not available to defendants on trial for lesser crimes..."); Michael Miller, Note, *Romano v. Oklahoma: The Requirement of Jury's Sense of Responsibility and Reliability in Capital Sentencing*, 44 CATH. U.L. REV. 1307, 1352 (1995) (criticizing the dilution of the "death is different" doctrine by failing to "adhere to the requirement of higher scrutiny and the emphasis on reliability.").

capital cases, this view is readily understandable. It would be foolish to deny that the Court's jurisprudence offers benefits to defendants in capital cases. Its rejection of mandatory death penalty statutes is a significant protection against unjust sentences of death, as is the requirement that defendants are entitled to introduce mitigating evidence. Its proportionality rulings have taken death off the table for a host of defendants.²³¹

But, as Carol and Jordan Steiker have explained, these protections, while important, have not been costless. Precisely because these protections apply only to capital cases, there is a "widespread perception that the death penalty is extremely demanding."²³² After all, if death cases are subject to rules that do not apply to any other proceedings, it creates the appearance that these cases are subject to extra scrutiny that must provide added security against wrongful convictions and sentences and ensure the fair administration of justice.

The problem with this appearance is that it is false. Death cases are subject to more protections than noncapital cases; but, given that noncapital cases get almost no Court oversight or protection, the fact that death cases get more says very little. If state A provides certain forms of emergency medical care to the poor but no other health benefits, and state B provides nothing at all, it is true that state A is doing more to make health care available. But one cannot leap to the additional conclusion that state A is providing all the medical care that is necessary or sufficient. Yet, in the context of Supreme Court jurisprudence, that type of logic has prevailed in death penalty cases. Because they get more than every other case, there is a perception that death cases are getting all they need. Precisely because there are two tracks and a disparity between capital and noncapital cases, the public and government officials can easily be led to believe that death cases are getting the oversight they need to ensure just outcomes.²³³

²³¹ The Court's additional protections related to jury instructions, effective assistance of counsel, and habeas review are also worthwhile. Recognizing that these reforms are valuable does not mean that they are sufficient. For a probing critique of the Court's cases and their failure to live up to the goals set by *Furman* and *Gregg*, see Steiker & Steiker, *supra* note __, at 371-403.

²³² Steiker & Steiker, *supra* note __, at 402. See also Note, *Rhetoric of Difference*, *supra* note __, at 1611 (arguing that the death-is-different case law "gives ammunition to advocates of capital punishment" precisely because those cases get protections that other cases do not).

²³³ See, e.g. *The Modern View of Capital Punishment*, 34 AM. CRIM. L. REV. 1353, 1360-1361 (1997) (quoting Judge Alex Kozinski's view that innocent defendants are better off being charged with a capital crime in California because they will get "a whole panoply of rights of appeal and review that you don't get in other cases"); Patrick McIlheran, *Illinois Re-examines Life Sentences*, MILWAUKEE JOURNAL SENTINEL, Oct. 25, 2006, at A13 (observing that "the safeguards that states build into capital cases - the things that make the death penalty so costly - make it less likely an innocent man will be executed than simply imprisoned wrongly"); Steiker & Steiker, *supra* note __, at 436 ("[T]he elaborateness of the Court's death penalty jurisprudence fuels the public's impression that any death sentences that are imposed and finally upheld are the product of a rigorous - indeed, too rigorous - system of constraints."); Note, *The Rhetoric of Difference*, *supra* note __, at 1619 (arguing that the death-is-different jurisprudence, and especially the individualized sentencing component, "has produced a body of law that perpetuates popular

Thus, part of the reason that capital punishment as it is currently deployed continues to enjoy support from the public and the officials who administer it is that it is given special treatment by the Court. If the Court were to follow the same rights framework that governs all other constitutional cases and give capital and noncapital defendants the same protections, death cases would no longer present the false appearance that they are getting something more. With this comparative advantage off the table, it seems likely that the focus would shift to the substance of the protections themselves to see if they are sufficient. Whether that focus would ultimately lead to improvements for capital defendants is an open question, but at least attention would be drawn to the right question. With the two-track system in place, it is all too easy to avoid close consideration of what process is actually provided in death cases and whether it addresses the main concerns with capital punishment's administration.

B. How the Two-Track System Harms Noncapital Defendants

It is readily apparent that noncapital defendants have been poorly served under the Court's death-is-different sentencing jurisprudence. Noncapital defendants have received almost none of the benefits that the Court has bestowed in capital cases.

What may be less obvious, however, is how the Court's death-is-different jurisprudence serves as a catalyst for this disparity. After all, one might not think that the Court's sentencing jurisprudence is a zero sum proposition, with additional benefits for capital cases leading to fewer protections in noncapital cases. In fact, the Court's failure to regulate noncapital proceedings is a direct outgrowth of the Court's decision to create a separate jurisprudence for capital cases.

To understand this inverse relationship, think about how constitutional litigation is conducted at the Court. Litigators seeking social reform typically look for the most sympathetic case to serve as the vehicle for making their request for recognition of a constitutional right. They know to pick cases where the absence of a substantive or procedural protection will give the Court the greatest concern. In the context of criminal cases, nothing compares to capital cases for tapping into the Court's sympathies. Indeed, that is why so many cases establishing landmark constitutional rights for all criminal defendants involved defendants facing capital punishment.²³⁴ There is no greater state power than the authority to take away a life, so there is no situation where a right is of more importance. These cases are thus the perfect vehicles for obtaining rights that will then benefit all defendants, even those who would not present an equally sympathetic case. For they force the Court into a position where it must decide whether it is willing to recognize the right across-the-

support for the death penalty" and concluding that the "rhetoric of difference" should therefore be abandoned by abolitionists).

²³⁴ See Liebman, *supra* note ___, at 2034-2037 (describing this litigation strategy and its successes).

board or accept that the most sympathetic cases will not get the benefit of a needed protection.

In the context of the Eighth Amendment and substantive sentencing review, however, this strategy is unavailable. Capital cases cannot be used as vehicles for reforming the entire system because they have been put on a separate track. The Court in this context can therefore deal with only these sympathetic cases and ignore the rest.

The lack of this leverage with the Court has been a key reason why noncapital cases raising sentencing issues have fared so poorly in getting judicial protection. The existence of the Court's death-is-different jurisprudence shows that the Justices are greatly disturbed by procedural unfairness in capital cases. Indeed, each of the death-is-different cases is a testament to the Court's commitment to creating a just sentencing system when the state seeks an execution. These cases would normally be the ideal vehicles for getting a right recognized for all defendants. In contrast, the Court has not been as moved by noncapital cases. Either because of the greater moral weight of being part of the "machinery of death" or because of its administrative or political concerns with policing all criminal sentences instead of just capital ones,²³⁵ the Court has taken a hands-off approach to noncapital proceedings.

The ability to put capital cases on one track and noncapital cases on another means the Court never has to face the difficult question of whether its concern about procedural justice for capital defendants is sufficiently strong that it would maintain those protections even if it meant having to extend them to all defendants and, by extension, to increase the Court's supervisory role in criminal cases because there are so many more noncapital cases. By allowing itself the option of treating the most sympathetic cases to their own jurisprudence, the Court has made it all but impossible for all other cases – that is, the 99% of criminal defendants who do not face a death sentence – to succeed.

The Court's two-track system makes it even more difficult for noncapital defendants to obtain any kind of relief because it also alters the approach that litigants at the Court pursue. In the absence of the Court's willingness to create a separate track for death cases, sentencing reformers would likely join forces to argue for needed criminal law reforms that would apply to all defendants.

²³⁵ Death cases are a minute portion of the overall criminal caseload, so any extra protections exact a relatively minor toll on the judiciary. Of course, this does not mean that extra protections which result in longer proceedings are costless. Although estimates vary, the average death penalty case costs well over a million dollars, and often considerably more. *Costs of the Death Penalty and Related Issues: Hearing on House Bill 1094 Before the Colorado House of Representative Judiciary Committee* (Colo. February 7, 2007) (testimony of Richard C. Dieter, Executive Director of the Death Penalty Information Center) (noting studies finding the average cost of a death penalty case running anywhere from \$1.26 million up to \$24 million), available at <http://www.deathpenaltyinfo.org/COcosttestimony.pdf>; Liebman, *supra* note __, at 2129 (noting that executions have an average cost of roughly \$3.2 million in Florida, \$3 million in Pennsylvania, \$2.16 million in North Carolina, \$2.3 million in Texas, and \$5 million in California and pointing out that the number grows much higher – "perhaps upwards of \$20 million) when post-conviction litigation costs are included).

Or, at the very least, these reformers would not take positions at odds with one another. One can see this in those areas of criminal law where the Court has not created a special jurisprudence for death cases. Thus, in cases involving the Fourth Amendment or *Miranda* warnings, capital and noncapital defendants do not make arguments at odds with the interests of one another.

When the Court recognized two competing tracks for Eighth Amendment purposes, however, it took these natural allies and separated them into two camps: those who represent the interests of capital defendants and those who represent the interests of noncapital defendants. Under a death-is-different regime, capital defense lawyers and abolitionists have the incentive to disavow the interests of noncapital defendants to improve the lot of their clients on death row.

Capital defendants have learned, for example, to ask the Court for special protections while at the same time acknowledging that those same protections need not apply to noncapital defendants. Thus, when the American Psychological Association filed a brief in support of the petitioner in *Ake v. Oklahoma* and requested expert mental health evaluations for indigent defendants, it minimized the cost concerns with this request by noting that “[i]f this Court’s holding were restricted to apply only to capital cases, the numbers involved would be even more limited.”²³⁶

Lawyers representing capital defendants have also accepted the legitimacy of even the harshest noncapital sanctions to save their clients from death. For instance, *Roper* and his amicus made proactive use of the general trend in states to “get tough” on juveniles by contrasting it with the opposite trend in many states to raise to 18 the age at which someone could be sentenced to death.²³⁷ They pointed to states like New York and its decision “that juvenile offenders may spend the rest of their lives in prison, but it is not permissible to execute them,”²³⁸ as evidence that the Court could safely restrict capital punishment to individuals 18 years and older. The Court accepted this argument, noting in its opinion that some five states had banned execution of juveniles since it considered the issue in *Stanford*,²³⁹ and contrasting that with the “particular trend in recent years toward cracking down on juvenile crime in other

²³⁶ *Ake v. Oklahoma*, 1983 U.S. Briefs 5424, Brief of Amici Curiae American Psychological Association and Oklahoma Psychological Association in Support of Petitioner at 25. Scholars have taken this approach as well. See, e.g., Joseph L. Hoffman, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771, 1801 (2000) (arguing that because death is different, “[s]ubstantive Eighth Amendment habeas review is a special protection that need not be extended to non-capital convictions or sentences.”).

²³⁷ Brief of New York et al. as Amici Curiae in Support of Respondent at 18-24, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636449; Brief of Juvenile Law Center et al. as Amici Curiae in Support of Respondent at 19-22, *Roper v. Simmons*, 543 U.S. 551 (No. 03-633), 2004 WL 1660637.

²³⁸ Brief of New York et al. as Amici Curiae in Support of Respondent at 22, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636449

²³⁹ *Roper*, 543 U.S. at 565.

respects.”²⁴⁰ Thus, the briefs supporting an exclusion of juveniles from the death penalty used the harsh noncapital juvenile laws to support their claim, instead of highlighting that those laws, too, failed to appreciate the limited culpability of juveniles. This was obviously a strategic move on the part of amicus – and a wise one in light of the outcome of the case.

James Liebman has argued that the strategic choice to highlight the availability of life without parole in general “has been absolutely critical to whatever progress has been made against the death penalty.”²⁴¹ Life without parole may be an appropriate sentence in a given case, with individuals previously facing the death penalty likely being the most deserving offenders for such a sanction. The problem is that life without parole will also frequently be a disproportionate sentence in a given case, as noncapital sentencing reformers have tried to highlight. Its near-universal endorsement by death penalty abolitionists is troublesome because they seem to be approving it as a general matter in their arguments to the Court, which may, in turn, limit the Court’s sense of how bad a punishment it is.²⁴² Thus, as Markus Dubber has noted, the “‘the death is different’ campaign of opponents of capital punishment” may have “won capital defendants certain additional protections, but only at the considerable cost of lumping together all other penalties under the rubric of ‘noncapital’ punishments, thereby effectively shielding incarceration from constitutional scrutiny.”²⁴³

Nor are capital defendants the only litigants who have learned the value of death-is-different arguments. States resisting expanded constitutional rights rely on the Court’s two-track system to keep the Court from imposing the same requirements in noncapital cases. The State of Illinois, for instance, argued that the actual innocence exception to the procedural default rule for federal habeas corpus claims should be limited to capital cases.²⁴⁴ Illinois relied on the Court’s recognition “that the gravity of capital punishment necessitates additional procedural safeguards as compared to proceedings involving lesser penalties.”²⁴⁵ It also highlighted administrability concerns with extending the

²⁴⁰ *Id.* at 566.

²⁴¹ Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. TIMES, Oct. 5, 2005, at 3 (quoting James Liebman); see also Editorial/Opinion, *Juveniles will Evade Death Penalty, Not Harsh Justice*, U.S.A. TODAY, Mar. 2, 2005, at 12A (arguing that death penalty for juveniles was a failed experiment but that juveniles previously facing death penalty “should be sentenced to life without chance for parole”). See also NCADP: The National Coalition to Abolish the Death Penalty, *Death Penalty Overview: Ten Reasons Why Capital Punishment is Flawed Public Policy*, <http://www.ncadp.org/index.cfm?content=5> (last visited Jun. 15, 2008) (noting that “life without parole is a sensible alternative to the death penalty”).

²⁴² Dubber, *supra* note __, at 713 (A sentence of life without parole “has come to be regarded as a benign penalty, thanks in no small part to the ‘death is different’ campaign of opponents of capital punishments.”).

²⁴³ *Id.* at 713-714.

²⁴⁴ Brief of the States of Illinois et al. as Amici Curiae in Support of Petitioner at 13-16, *Dretke v. Haley*, 541 U.S. 386 (2004) (No. 02-1824).

²⁴⁵ *Id.* at 14-15.

actual innocence exception because “[e]xtending the exception to noncapital sentencing would convert the exception from one applicable only in the ‘extraordinary case,’ to a common occurrence.”²⁴⁶

One can hardly blame these litigants for taking the stances they do. The Court created a death-is-different framework that makes these arguments not only acceptable, but necessary to serve the interests of one’s client. The problem is that, because litigants have the incentive – indeed, the obligation – to make these arguments, the death-is-different philosophy gets reinforced and the Court repeatedly hears arguments that effectively cast aside all other punishments as less important. In this way, the two-track system is self-reinforcing. Once it is established, it is hard to dismantle because the Court can continue to save itself the cost of additional oversight obligations that interfere with the political branches, and it is repeatedly presented with arguments approving of its approach. As long as the Court allows itself to draw a line between defendants with sentencing rights and those without, noncapital defendants will lack critical protections.

C. *The Two Tracks Mirror the Irrationality of Sentencing Politics*

The Court’s failure to protect the rights of noncapital defendants is particularly troublesome because the political process is so biased against noncapital defendants. Criminal defendants and their representatives are, to put it mildly, a politically weak group. In contrast, many powerful forces are in favor of get-tough sentencing legislation, making it a political winner for politicians. The result is a political process that produces ever harsher noncapital sentences.²⁴⁷ Arguments about fiscal discipline have led to some moderate improvements in sentencing laws, but by and large, most sentences have remained unchanged or have been increased.²⁴⁸ That is why the prison population continues to escalate at a rapid rate.²⁴⁹ Politicians continue to pass criminal laws with longer sentences and more mandatory minimums without stopping to consider whether they produce excessive punishments in individual cases. The media and the public pay little attention to the injustices associated

²⁴⁶ *Id.* at 15 (citing *Carrie*, 477 U.S. at 496). Someone ironically, Illinois dismissed the court of appeals’ effort to make an extension workable by limiting it to habitual offender sentences. Illinois argued that “this Court’s actual innocence jurisprudence does not turn on the simple concept of ease of application.” *Id.* at 15-16.

²⁴⁷ I have written about this political dynamic in greater detail elsewhere. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1028-1031 (2006); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1280-1283 (2005); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723-735 (2005).

²⁴⁸ See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1277, 1285-1290 (2005) (describing reforms based on cost constraints that are an exception to the otherwise punitive trend); Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1713 n.5 (2006) (noting the increase in sentences from 1988 to 2000).

²⁴⁹ In 1980, there were 1,118,097 people on probation; 183,988 people in jail; 183,988 in 319,598; and 220,438 on parole, for a total of 1,842,100 people under correctional supervision. By 2006, there were 4,237,023 people on probation; 766,010 in jail; 1,492,973 in prison; 798,202 on parole, for a total of 7,211,400 people under correctional supervision. U.S. Dept. of Justice, Office of Justice Programs, *Key Facts at a Glance: Correctional Populations*.

with excessive punishment because they are more concerned with cases where the sentences are too lenient. As William Stuntz has explained, this political environment frequently produces sentences in particular cases that even legislators who passed the legislation believe are too long.²⁵⁰ Without judicial oversight by either judges or juries (because some 90-95% of all noncapital cases end in pleas, not trials), there is little to police these disproportionate and arbitrary sentences except the discretion of the prosecutor bringing the charges. That mechanism has fallen far short of an adequate check.²⁵¹

Although the politics surrounding capital punishment is not exactly a model of rational deliberation, legislative reforms have been more frequent and expansive in that context. Fourteen states and the District of Columbia have abolished the death penalty, with New Jersey making the decision to abolish it last year.²⁵² A number of states now have vibrant grass-roots campaigns seeking abolition of the death penalty,²⁵³ and several other states with the death penalty on the books rarely if ever carry out an execution.²⁵⁴ Indeed, only a handful of states account for the executions in the United States. Moreover, even in those states that execute defendants, significant reforms have passed. For example, before Court decisions making the practices unconstitutional, a number of states with capital punishment had eliminated the death penalty for juveniles²⁵⁵ and the mentally retarded,²⁵⁶ all states had rejected execution of the mentally insane,²⁵⁷ and most states did not authorize the death penalty for the rape of an adult woman,²⁵⁸ for the rape of a child,²⁵⁹ or for participation in a robbery where

²⁵⁰ Stuntz, *supra* note 115, at 2556-2558.

²⁵¹ Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors*, 61 STAN. L. REV. __ (forthcoming 2009).

²⁵² Death Penalty Information Center, Death Penalty Fact Sheet (2008), *available at* <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

²⁵³ Liebman, *supra* note __, at n.264 (noting that “serious abolition campaigns are taking place in Kentucky, Missouri, New Hampshire, and Oregon).

²⁵⁴ Carol and Jordan Steiker refer to these states as “symbolic states,” and they include in this camp both states that rarely give death sentences at all and those that give death sentences but then fail to carry out the execution. Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1870 (2006).

²⁵⁵ Eighteen states that otherwise allowed the death penalty for other offenders had banned it for juveniles. *Roper*, 543 U.S. at 564.

²⁵⁶ Eighteen capital jurisdictions prohibited the death penalty for the mentally retarded. *Atkins*, 536 U.S. at 313-315.

²⁵⁷ *Ford*, 477 U.S. at 408 (“no State in the Union” allows execution of the mentally insane).

²⁵⁸ *Coker*, 433 U.S. at 595-596 (only Georgia authorized the punishment of death for rape of an adult woman).

²⁵⁹ The Court in *Kennedy* noted that only 6 of the 37 jurisdictions that allow the death penalty have authorized the death penalty for the rape of a child. Slip op. at 15. The Court’s count was mistaken, however, because the federal government authorizes the death penalty for child rape in military cases. Linda Greenhouse, *Justice Dept. Admits Error in Not Briefing Court*, N.Y. TIMES, July 3, 2008.

an accomplice takes a life.²⁶⁰ Between 2000 and 2005, every death penalty state but two had enacted some kind of reform measure.²⁶¹ A host of states have imposed or proposed a moratorium on executions or have insisted on studies addressing the fairness of their capital sentencing procedures.²⁶² Even in Texas, where the death penalty is administered more frequently than any other state and where more than 80% of the public supports capital punishment, a majority of the public supported a moratorium on executions to make sure they were administered fairly.²⁶³ Indeed, conservative commentators who have in the past supported the death penalty have recently come out in favor of measures to check government power in this context, with some even urging abolition.²⁶⁴

The difference in the politics of these two areas of sentencing is in part based on the fact that death is different in terms of its emotional impact on the public, just as it has been on the Court. The specter of an unjustified state killing is a powerful rhetorical tool that has mobilized a significant portion of the public to take a closer look at whether and when capital punishment is appropriate.²⁶⁵ This portion of the population is sufficiently large and invested in the issue that it has successfully pushed for the political changes discussed above. Moreover, unlike noncapital cases, which rarely go to juries, capital cases almost always do, and jurors serve as an additional check on the state.²⁶⁶ If the state tries to go beyond what the public would accept in an individual case, the jury can represent that community view and prevent that excessive

²⁶⁰ *Enmund*, 458 U.S. at 792 (only eight states authorized the death penalty for “to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed”).

²⁶¹ Lain, *supra* note __, at 50 and n.260. As Professor Lain points out, even conservative commentators had begun to express doubts about the death penalty. *Id.* at 51.

²⁶² Liebman, *supra* note __, at n.264 (listing states).

²⁶³ Scott Vollum et al., *Confidence in the Death Penalty and Support for Its Use: Exploring the Value-Expressive Dimension of Death Penalty Attitudes*, 21 JUST. Q. 521, 533 (2004).

²⁶⁴ Liebman, *supra* note __, at n.264 (including George F. Will, Pat Robertson, Henry Hyde, and Oliver North among those conservatives who have expressed concern with the administration of the death penalty).

²⁶⁵ Although it has had its struggles with framing a consistently successful message, the anti-death penalty movement has, with some success, expanded and diversified its membership by including students, victims’ families, members of various racial groups, and a variety of religious communities, such as Baptists, Catholics, Jews, Methodists, Presbyterians, Quakers, and Unitarians. Herbert H. Haines, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994*, at 102-116 (1996). At least one abolitionist organization has over one hundred state and national affiliates in all fifty states. National Coalition to Abolish the Death Penalty, <http://www.ncdp.org/index.cfm?content=2> (last visited July 29, 2008); <http://www.ncdp.org/affiliateDirectory.cfm> (last visited July 29, 2008).

²⁶⁶ The Court has observed jury reluctance to convict various categories of defendants on capital charges. See *Thompson v. Oklahoma*, 487 U.S. 815, 832-33 (1988) (plurality opinion) (juveniles); *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977) (rapists); *Enmund v. Florida*, 458 U.S. 782, 794-95 (aiders and abettors of felonies in which murder is committed but who do not themselves kill or intend to kill).

sentence. The media, too, helps to police excesses in capital punishment by reporting on its failings.²⁶⁷

The proportion of the population similarly emotionally invested in noncapital sentencing to mobilize for change is, in contrast, is negligible.²⁶⁸ Relatively few people care passionately about criminal sentencing the way that abolitionists feel about the death penalty.²⁶⁹ The media shares the public's indifference to noncapital cases. Whereas the media focuses critically on abuses with the administration of the death penalty, the same structural abuses exist in noncapital cases but rarely gain attention. In part, the relative frequency of noncapital sentencing is the problem. It is not news that someone gets a life sentence or a long term of incarceration. With a prison population of over two million, long sentences have become a dog bites man storyline. In contrast, the death penalty is administered infrequently enough that every execution gets national coverage and attention.²⁷⁰ As a result, the political process pays more attention to offenders facing death – and therefore offenders who have committed the most serious crimes – than all other offenders.

Far from correcting this imbalance, the Court feeds into it by also ignoring noncapital sentencing and putting all of its oversight into capital sentencing. While the public is free to pick and choose the issues that arouse its passions, the Constitution is designed to keep the Court's attention on the question of rights, not the groups or causes it cares most about. By ignoring the fundamental rights at stakes and playing favorites, the Court has abandoned its constitutional charge.

None of this to say that Court oversight is not needed in capital cases or that the politics surrounding the death is working effectively. The politics surrounding the death penalty are themselves deficient in multiple ways,²⁷¹ and the Court certainly has an important role to play. Rather, the point here is that

²⁶⁷ Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 15 available at <http://ssrn.com/abstract=1154766> (noting both traditional and non-traditional media sources disproportionately cover death penalty cases)

²⁶⁸ James S. Liebman et al., *Death Matters: A Reply to Latzer and Cauthen*, 84 JUDICATURE 72, 72 (2000) ("Compare, for example, the intensity with which citizens and policy makers debate the proper parameters of the death penalty, to the relative invisibility of analogous discussions of the proper scope of murder as opposed to manslaughter, or of mandatory minimum terms versus life without parole.").

²⁶⁹ The families and friends of those serving time take an interest, as do some academics. But these groups do not have much traction in the political process. See Barkow, *supra* note ___, at 725-727.

²⁷⁰ An analysis of each of the first ten executions that occurred after the United States Supreme Court lifted its moratorium on the death penalty with its decision in *Baze v. Rees*, ___ U.S. ___, 128 S. Ct. 1520 (2008) on April 16, 2008 revealed that at least one major newspaper in a state other than the state performing the execution featured a story about the execution after it occurred. A list of those prisoners executed in 2008 after the moratorium ended can be found at: Death Penalty Information Center, *Executions in the United States in 2008*, <http://www.deathpenaltyinfo.org/article.php?&did=2707> (last visited July 29, 2008).

²⁷¹ For a good discussion, see Smith, *supra* note ___, at 294-335.

there is no basis for the Court's two-track system that completely ignores the noncapital sentences that are often the product of an even more dysfunctional political process.²⁷²

This is all the more troubling given that the noncapital cases are the core of the criminal justice system in the United States. The Court is providing oversight to one percent of the criminal justice convictions.²⁷³ For the remaining 99% of criminal defendants, the Court provides virtually no review of the sentencing. Just as in the political process, these cases are falling under the radar, even though they affect millions of people.

IV. TOWARD A UNIFIED JURISPRUDENCE OF PUNISHMENT

Even if one agrees that the two-track system is unjustified as a matter of constitutional doctrine and unwise as a matter of policy, one might still have reservations about adopting a unified sentencing jurisprudence in which capital and noncapital cases are treated alike because of a fear that a unified theory would be even worse for defendants. After all, uniformity could mean that capital and noncapital sentences both receive the dismal treatment noncapital sentences currently receive.²⁷⁴

But it is unlikely that the Court would abandon all or even most of its capital regulation to avoid giving the benefits to noncapital cases. The main reason for this optimistic prediction is that the Court cares too deeply about capital cases and bears too much responsibility for them to abandon all the protections it has established in that context. As James Liebman has recently explained, relying on the work of Robert Cover,²⁷⁵ the Court feels an irresistible impulse to take an active role in regulating the death penalty because "the Justices' position astride the system of judicially deployed state killing create[s] a strong sense of superintending the violence," which "in turn arouse[s] a strong need to be sure the violence [is] justified."²⁷⁶ The Supreme Court receives a petition on the eve of almost every execution, with the petitioner asking for a reprieve from death. The Court cannot ignore its role in these cases, and it is now too engrained in the process to step aside. "After decades of regulating the death penalty at the behest of a committed and sophisticated capital defense bar on behalf of thousands of death row inmates, everyone looks to the Court to provide overreaching direction for the capital system, its

²⁷² See Barkow, *Federalism and the Politics of Sentencing*, *supra* note ___, at 1280-1283, 1291-1297 (describing the ways in which the politics of sentencing suffers from an imbalance of interests and is affected by cognitive biases)

²⁷³ In the last year in which comprehensive data is available, 2004, more than one million adults received noncapital sentences versus 115 people who received death sentences. U.S. Dept. of Justice, Office of Justice Programs, *Felony Sentences in States Courts, 2004* (July 2007).

²⁷⁴ The experience of seeking uniformity in federal sentencing law seems to provide a cautionary tale, for the drive toward uniformity there led to harsher sentences for everyone.

²⁷⁵ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1622-24 & nn. 50-54 (1986).

²⁷⁶ James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 106-107 (2007).

legal justification, and even the final order letting the execution proceed.”²⁷⁷ As Justice Jackson candidly stated, “[w]hen the penalty is death,” the Court is “tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.”²⁷⁸

It is not just the Court’s internal conscience that would lead it to continue regulating capital punishment. The Court also feels the pull of the public.²⁷⁹ The public has grown increasingly concerned with the administration of the death penalty,²⁸⁰ and it will continue to rely on the Court to police it. The Court, for its part, is unlikely to ignore these expectations. As Corinna Barrett Lain has recently explained, the Court’s recent decisions in cases like *Atkins* and *Roper* are explained in large part by sociopolitical changes since 2000 and the public’s increasing unease with how the death penalty is administered.²⁸¹ Press coverage of actually innocent people being convicted and of errors and inadequacies in death cases and at crime labs sparked a national debate about the death penalty,²⁸² leading to moratoria across the country as well as other legal reforms. As the public “lost confidence in the death penalty’s administration . . . the Court’s shift from *deregulating* to *reregulating* this area left little doubt that many of the Justices felt the same way.”²⁸³ The Court would not become immune to these pressures if it shifts to a uniform theory of sentencing.²⁸⁴

The public’s disinterest in noncapital cases is not likely to be enough to neutralize its demands for procedural justice in capital cases. On the contrary, there is reason to believe that the public would support reforms in both contexts that seek to end disproportionately harsh results in individual cases. While the public has supported harsher sentencing legislation, it has done so because it tends to have the worst cases in mind when it thinks about general laws. When members of the public are told about how these laws would apply in individual cases, they frequently disagree with the harsh outcomes they produce.²⁸⁵ This concern about a law’s application in some cases has not been enough to mobilize the public to seek or support broader reform of noncapital sentencing laws, but it would likely be sufficient to accept a Supreme Court jurisprudence

²⁷⁷ Liebman, *supra* note ___, at 126.

²⁷⁸ *Stein v. New York*, 346 U.S. 156, 196 (1953).

²⁷⁹ See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) (analyzing the dialogue between courts and political actors).

²⁸⁰ See TAN __ - __.

²⁸¹ Lain, *supra* note ___, at 35-54.

²⁸² *Id.* at 43-48

²⁸³ *Id.* at 53.

²⁸⁴ *Id.* at 68, 75-76 (explaining that moderate, swing votes on the Court are particularly influenced by changing sociopolitical norms and public opinion).

²⁸⁵ Barkow, *supra* note ___, at 748-751 (explaining that members of the electorate do not “exhibit the zeal for harsher sentences seen in the political arena” when they are given more information about how sentences would actually apply to particular cases).

that applied what are now exclusively capital protections to noncapital cases as well. Derrick Bell's theory of interest convergence seems applicable here.²⁸⁶ The noncapital cases are not of sufficient concern to get the public's or the Court's attention on their own, but when the interests of noncapital defendants converge with the interests of a group that the Court and the public cares more about – those facing death – reform is possible.

Uniformity is also likely to mean protection for both groups because many Justices are increasingly concerned with how the Court is perceived in the international legal community – a community that is actively opposed to the United States' approach to the death penalty.²⁸⁷ Legal jurists and scholars from around the world are increasingly filing briefs with the Court, urging it to comply with international standards,²⁸⁸ and the Court is relying on those briefs in making its decisions.²⁸⁹ For many Justices, the views of the international community likely matter on a personal level as well. The Justices increasingly take trips abroad to participate in discussions about constitutionalism with international lawyers and judges.²⁹⁰ Those exchanges would certainly be more

²⁸⁶ See DERRICK BELL, *SILENT COVENANTS* 69 (2004)

²⁸⁷ Corinna Barrett Lain argues that the Court in *Roper* was motivated by political concerns and the fact that “[b]y 2005, the death penalty in general, and the juvenile death penalty in particular, had become an international embarrassment to the United States and a major stumbling block in foreign relations.” Corinna Barrett Lain, *Deciding Death*, 57 *Duke L.J.* 1, 33 (2007). See also Yitzchok Segal, *The Death Penalty and the Debate over the U.S. Supreme Court's Citation of Foreign and International Law*, 33 *FORDHAM URB. L.J.* 1421, 1446 (2006) (noting that “the Western world has vehemently condemned capital punishment” and that opposition to the death penalty “has become a cornerstone of the European human rights movement”).

²⁸⁸ See, e.g., Brief of European Union and Members of the International Community as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1619203; Brief of former U.S. Diplomats Morton Abramowitz et al. as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636448. Brief for European Union as Amicus Curiae, *Atkins*, 536 U.S. 304 (No. 00-8452); Brief Amici Curiae of Leading British Law Associations, Scholars, Queen's Counsel and Former Law Lords in Support of Petitioner Patrick Kennedy, *Kennedy*, 128 S.Ct. 2641 (No. 07-343), 2008 WL 706791.

²⁸⁹ See, e.g., *Kennedy*, 128 S.Ct. at 2650 (listing international opinion as criterion to be considered); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005); *Atkins*, 536 U.S. at 316, n. 21. Segal, *supra* note __, at 1428 (noting that the Eighth Amendment cases are ones in which “foreign and international legal materials have been invoked with great frequency” and “citations to comparative legal materials have become a hallmark of Eighth Amendment jurisprudence”). One commentator observed of *Roper* that, if the Justices did not exempt juveniles from the death penalty, “it would have been another Abu Ghraib. The outcry around the world would have been simply astounding.” Adam Liptak, *Another Step in Reshaping the Capital Justice System*, N.Y. TIMES, Mar. 2, 2005, at A13. See also Lain, *supra* note __, at 54 (“Indeed, had the Justices not prohibited the death penalty for the mentally retarded and juvenile offenders, the Court may well have suffered more damage to its institutional image than it did from exposing its ‘intellectually embarrassing Eighth Amendment jurisprudence.’”) (citing Robert Weisberg, Op-Ed., *Cruel and Unusual Jurisprudence*, N.Y. TIMES, Mar. 4, 2005, at A21).

²⁹⁰ Linda Greenhouse, *Evolving Opinions: Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, sec 4 (noting that “the justices have begun to see themselves as participants in a worldwide constitutional conversation”); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 66 (2004) (describing Chief Justice Rehnquist's policy of urging all United States judges to participate in international judicial exchanges in order to better understand one another).

strained if the Court were to jettison its oversight of capital cases. To be sure, not every Justice would care about the relationship between the Court's rulings and their own international popularity – and one could reasonably argue that this should not be a factor at all for a judge. But judges are human, and for some of them, this legal peer pressure would be an additional factor that would prevent much, if any, deregulation of death.

The continuing regulation of the death penalty – and therefore additional regulation for noncapital cases under a uniform sentencing jurisprudence – seems especially likely for those pockets of law that are easily administrable in both contexts without a great cost to the government. It is hard to imagine any scenario where the Court would allow mandatory death sentencing just to avoid prohibiting mandatory punishments in noncapital cases. A uniform rule that prohibits mandatory punishments in all cases would be easily applied by judges, and it would be consistent with the overwhelming consensus against mandatory statutory sentences by legal experts and judges of both parties.²⁹¹

Although one cannot predict with the same confidence the fate of the other death regulations, they also seem likely to survive, at least in part. It would be difficult for the Court to disavow *Furman*'s core concern with arbitrary and capricious punishments when that goes to the heart of the Court's worries with the death penalty. Nor would it be prohibitively difficult to insist that noncapital sentencing laws take more care to guide the discretion of the sentencer. With more than a third of all states turning to guidelines and many more headed in that direction, the Court would be following a movement that is already in place and could turn to those guidelines to gauge how much detail a statute must provide to avoid arbitrary and capricious sentencing in noncapital cases. To be sure, avoiding arbitrary and capricious death sentencing has hardly been a success story, and it would be even more difficult in noncapital cases. So the Court could well decide that little can be done in this area. But whatever the Court were to decide, the framework of a bifurcated capital trial with attention to aggravating factors is so entrenched that it seems unlikely to leave the scene whether the Court orders it or not.

It is more difficult to predict what the Court would do with its *Lockett/Eddings* line of cases insisting on individualization. On the one hand, requiring individualization in noncapital cases would be relatively straightforward in terms of the Court's administrative responsibilities because the Court would need only make clear that defendants must be allowed in noncapital cases to present mitigating evidence before sentencing. On the other hand, this holding could be costly to the government and lower court judges because it would increase the complexity of sentencing proceedings. It also creates tension with the Court's concern with arbitrary and capricious sentencing, as the experience in capital cases has made plain. There are two Justices on the current Court who have indicated a willingness to jettison some

²⁹¹ See *Harris*, 536 U.S. at 570-571 (Breyer, J., concurring in part and concurring in the judgment) (citing long list of critics of mandatory minimums including members of both political parties).

or all of this case law precisely for this reason. But other Justices, like Justice Blackmun, have felt so strongly about the need for individualization that they would rule the death penalty itself unconstitutional before abandoning it. And even in the face of great tension between this line of cases and *Furman* itself, the Court has continued to adhere to the need for individualization.

This, then, might be an area where the Court would seek a compromise position. Right now, the Court places no limits on what mitigating evidence capital defendants are entitled to present. Because these proceedings are so few in number, this approach does not strain the system, so the Court has been unwilling to consider the issue with more care. If it had to adopt a rule of mitigation that applied to all cases, in contrast, the Court might spend more time thinking about what kind of mitigating evidence is truly crucial to a just regime in order to justify the costs it would impose once applied across the board. Disciplined by these practical considerations, perhaps the Court would adopt something along the lines of the approach recommended by Carol and Jordan Steiker, which would require only mitigating evidence that relates to a defendant's reduced culpability. The state would not need to permit evidence about a defendant's good moral character or prospects for rehabilitation.²⁹² This more restricted view of mitigation would not only be more workable but would also be less likely to lead to the arbitrary infliction of the death penalty based on whether a jury thinks a particular defendant is attractive or has an appealing personality.²⁹³ A uniform approach could be just the catalyst the Court has needed to improve this area of the law. This is admittedly speculation. It is certainly possible that this is an area that the Court would no longer regulate. But the longevity of this line of cases in the face of criticism makes it far from certain that the Court would abandon it outright, so a compromise position along the lines of culpability seems at least possible.

The fate of proportionality review is also hard to predict. Some things would undoubtedly stay the same. The Court could continue to adhere to categorical exemptions of certain offenses in capital cases because, as the most severe punishment, it is entirely consistent with a unified theory to exempt certain offenses from that category. The tougher question is what would happen to the Court's exclusion of certain offenders from capital punishment? It seems highly unlikely – given the Court's responsibility for capital cases, its great concern with them, and its attention to its international reputation – that it would allow juveniles, the mentally retarded, or everyone convicted of felony murder to once again become eligible for the death penalty. The Court would likely want to maintain its categorical rule excluding these offenders from capital punishment. But to do so and have a consistent theory of sentencing, the Court would have to allow these same offenders to raise a defense of reduced culpability in all noncapital cases. In other words, the same reduced culpability that categorically exempts these offenders from death could, in

²⁹² Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 864-865 (1992).

²⁹³ *Id.* at 870 (arguing that the more individual facts a jury can consider about a defendant's background, personality and redemption, "the greater the opportunity for arbitrariness and bias").

individual cases, mean they deserve a sentence that is reduced from the sentence that applies to everyone else. Allowing this type of individualization is already permitted in many jurisdictions at very little cost to the system, so the Court is unlikely to resist it given its great concern with capital cases.

The remaining question about proportionality is whether the Court would use the test for excessiveness established in death cases or the one it applies in noncapital cases. There are two main differences between the two contexts. First, in noncapital cases, Court will not even engage in the inter-jurisdictional comparison of how the crime is treated in other places or the intra-jurisdictional comparison of how the sentence for the crime at issue compares to sentences for other crimes unless it makes a threshold finding that the state has no “reasonable basis for believing” that the penalty it selected will serve either deterrent, retributive, rehabilitative, or incapacitation goals.²⁹⁴ Second, in capital cases, the Court conducts its own independent assessment to see if the gravity of the offense and the culpability of the offender justify a sentence of death regardless of whether there is objective evidence of a consensus against the punishment.²⁹⁵

It is hard to say what would happen if the Court had to adopt a uniform proportionality test. The Court’s use of its “independent judgment” is perhaps the most vulnerable of all its death-is-different rules. It rests on weak rule-of-law footing.²⁹⁶ Without the ability to point to history or contemporary standards or social science evidence, the Court could simply outlaw a punishment based on little else than a personal feeling. While the Justices undoubtedly use personal instincts and beliefs in deciding other cases, this is an area where the Court has been particularly open about its approach – and has been subject to criticism as a result. There is no natural limit to what the Court can strike down on this basis, so if this standard were to apply outside the death penalty context, it would cast doubt on any number of criminal penalties, create tension with the political branches, and perhaps raise the question of the Court’s legitimacy. But, the Court has made ample use of this authority in the death penalty context. Without the ability to bring its independent judgment to bear on the question of proportionality, it arguably could not have reached the results it did in *Roper*, *Atkins*, or *Kennedy* because there was not a strong consensus in the United States against executing juveniles, the mentally retarded, or child rapists.

²⁹⁴ *Ewing*, 538 U.S. at 28 (plurality opinion).

²⁹⁵ Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 689 and n. 54 (2005) (citing Court decisions using this test). For a recent example, see *Kennedy v. Louisiana*, 554 U.S. ___ (2008); slip op. at 10 (noting that the Court’s “own independent judgment” supports its holding that it is unconstitutional to impose a death sentence for one who rapes a child).

²⁹⁶ After Justice Stevens recently relied on his “own experience” to conclude that the death penalty is no longer constitutional, *Baze v. Rees*, 553 U.S. ___ (slip op. at 17) (2008) (Stevens, J., concurring in judgment), Justice Scalia wrote a scathing opinion noting that “[p]urer expression cannot be found of the principle of rule by judicial fiat.” *Id.* at ___ (slip op. at 7) (Scalia, J., concurring in judgment).

It is similarly difficult to anticipate what would happen to the threshold inquiry the Court now uses in noncapital cases. Applying that threshold inquiry across the board would make it harder to strike down capital statutes because the state could reasonably believe that the death penalty would serve either deterrent, retributive, or incapacitative goals in most cases.²⁹⁷ Many of the Court's recent cases arguably could not stand if this test were applied at the outset. Moreover, it is unclear that the threshold test even commands a majority of the current Court in noncapital cases. That said, the Court has been so reluctant to police noncapital sentences that it might resist removing a threshold test that allows it to avoid making tough calls about which punishments cross the line.

Predicting the future has its perils, but there are good reasons to believe that a uniform jurisprudence would lead the Court to keep at least some of its capital sentencing regulation. Moreover, the areas that would be discarded would not necessarily leave an inferior capital punishment regime in its place. Uniformity would inevitably mean that the Court would pay more attention to the costs of its rules because it would have to consider how those rules would apply in hundreds of thousands of noncapital cases. The Court would no longer have the luxury of imposing intricate and expensive procedures with the knowledge that they would apply to a relative handful of capital cases. Once the Court is forced to consider the toll its requirements would take on the entirety of the criminal justice system, it would likely use more care in how it constructs them, which might sharpen its focus on what judicial oversight is most important and useful.²⁹⁸ The uniform approach could thereby help avoid the problem of "selective attention,"²⁹⁹ where the Court focuses only on the needs of a small subset of defendants and fails to recognize other problems with sentencing. By looking at all the cases in the mix, the Court can decide where judicial resources are most needed – not by favoring some defendants over others, but by crafting uniform procedural rules that will benefit all.

²⁹⁷ There is a lively debate over whether capital punishment actually deters homicides. Compare Cass Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 706 & n.9 (2006) (citing studies finding a deterrent effect) with Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255 (2006) (finding numerous technical and conceptual errors in deterrence studies); John Donahue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005). But the Court's test requires only that the state have a reasonable basis for its views, so even though the evidence of a deterrent effect is far from conclusive, states would likely be found reasonable if they relied on the studies finding a deterrent effect.

²⁹⁸ As Stephen Holmes and Cass Sunstein have pointed out, "[n]o right whose enforcement presupposes a selective expenditure of taxpayer contributions can, at the end of the day, be protected unilaterally by the judiciary without regard to budgetary consequences for which other branches of government bear the ultimate responsibility." STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* 97 (1999).

²⁹⁹ *Id.* at 125 ("A key goal of the legal system ought to be to overcome the problem of selective attention, a general problem that emerges whenever participants focus on one aspect of an issue to the exclusion of other aspects.").

But even if these optimistic predictions are wrong and death cases were to lose most of the protections they have now, that would not necessarily mean capital defendants would be worse off. As noted, the existence of the Court's special rules for death cases creates problems of its own for those seeking abolition or reform of the death penalty because the Court's rules lull the public and those who participate in capital decisionmaking into a false sense that capital cases are sufficiently protected by the judiciary. If those protections were removed, those concerned with the fair administration of capital punishment could no longer take false comfort in the comparative advantages of death cases.³⁰⁰ Instead, they would have to convince themselves that the procedures are sufficient – a task that would be made difficult, to say the least, if the only judicial restrictions on capital punishment were the weak ones that now apply in noncapital cases. In the absence of any Court-imposed regulation, the political process would likely provide some regulation of its own. While that might be the reinstatement of the rules abandoned by the Court, it is also possible that regulation from a source other than the Court would yield substantive rules that pay closer attention to the real deficiencies with capital punishment's administration.³⁰¹

But even assuming this political safety valve does not operate and some of the procedural protections are lost to capital defendants and not replaced by something else, that still does not mean a uniform approach would be worse than what we have now. The cost to capital cases in lost rights must be weighed against whatever benefits are achieved in noncapital cases. Most death penalty reformers are of the view that the gains from the Supreme Court's case law have been modest at best.³⁰² Their core concerns about the death penalty remain. So, if some of those small gains were lost, capital punishment would be worse off, but not by that much.

Contrast that with the situation for the millions of noncapital defendants. They currently get almost no Court oversight of their sentence. Even if the Court were to extend only one of its death-is-different rules to noncapital sentencing, the results would be dramatic. Consider the rule most likely to be

³⁰⁰ To be sure, the lengthy trial and appeals process of a death case would not disappear under a two-track system, so even if officials were aware that the cases were governed by the same standards, perhaps the public would still think these cases are getting something more by the sheer length of time during which they spend being reviewed. But without special rules being applied, it might be possible to educate the public that death cases are not receiving special treatment; they are just taking longer.

³⁰¹ Cf. William J. Stuntz, *Accountable Policing* at 34, Harvard Public Law Working Paper No. 120, available at <http://ssrn.com/abstract=886170> (“It seems the surest way to promote legislative action is for the Supreme Court to deem legal protection unnecessary.”).

³⁰² See e.g., Steiker & Steiker, *supra* note __, at 401 (calling the Court's death-is-different doctrine “nothing more than a modest, ad hoc series of limitations on particular state practices”); *id.* at 391 (noting that the Court's doctrine still “invites arbitrary and even invidious decisionmaking”); Smith, *supra* note __, at 334 (noting that, in practice, we have a politicized death penalty system); Liebman, *supra* note __, at 119-120 (noting that while “some good has come of the Court's capital jurisprudence... its progress has been more in circles than forward.”).

maintained under a uniform theory: a prohibition on mandatory sentencing laws. If mandatory punishments were eliminated, it would make a dramatic difference for the thousands upon thousands of defendants serving these sentences,³⁰³ as well as the countless others who plead guilty to avoid being charged under a mandatory minimum statute.³⁰⁴ In noncapital cases, even this one rule change would make a world of difference – and would affect hundreds of thousands of defendants, not just the handful serving time on death row. This kind of reform alone would therefore justify the switch to a uniform jurisprudence of sentencing.

CONCLUSION

The Court's two-track approach to sentencing is legally and normatively untenable. A uniform approach under which all criminal defendants get the same Eighth Amendment protection would put the Court's sentencing jurisprudence back into the constitutional mainstream. When it comes to protecting fundamental rights, death should not be different. The Court should not be permitted to establish a separate jurisprudence for what it views as the most sympathetic cases. It should hold itself to the same equal protection standards it holds the political branches. Doing so would likely produce the same salutary effects that equal protection requirements have had in other contexts, with sentencing law improving not just for a select few, but for all who face the punitive power of the state.

³⁰³ In one year alone, more than 20,000 offenders faced mandatory minimum sentences at the federal level. UNITED STATES SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS. As of the beginning of 2006, 65 percent of the adult offenders in New Jersey were serving mandatory minimum terms. New Jersey Department of Corrections, Frequently Asked Questions, available at <http://www.state.nj.us/corrections/freqntlyasked.html>. When one adds all the states that have mandatory minimum sentences to the mix and considers that these sentences are sought year after year, it is not unreasonable to expect that this one rule could affect hundreds of thousands of offenders.

³⁰⁴ Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 78 (1993) (prosecutors who threaten to file a charge with a mandatory minimum sentence “pressure defendants, who otherwise might test the state's evidence, into accepting guilty pleas”); Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 425 (2008) (observing that mandatory minimums give prosecutors even more power over defendants than they have traditionally enjoyed). Cf. Smith, *supra* note __, at 375 (noting that death cases get litigated even when defendants plead guilty because sentencing is still an issue for the jury).